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NEW JERSEY, ss

WRIT OF ERROR

The State of New Jersey to William S. Gummere, Esquire, one of the Justices of the Supreme Court of the State of New Jersey, and to the Judge of the Court of Common Pleas of Essex County, constituting the Court of Oyer and Terminer, holden at Newark, in and for the County of Essex, of the Term of April, 1928. 10

Because in the record and proceeding, and also in giving of judgment upon a certain indictment against Gerardo Traficanto, late of the City of Newark, in the County of Essex aforesaid: 20

“For that on the tenth day of March, in the year of our Lord 1928 at the City of Newark, in the County of Essex aforesaid did wilfully feloniously and of their malice aforethought kill and murder Anniello Tamburo, contrary to the form of the Statute in such case made and provided, and against the peace of this State, the government and dignity of the same.”

Pro ut the said indictment and the several counts therein, whereof, before you, he the said Gerardo Traficanto, hath been indicted, and is thereof convicted by a certain jury of the County, taken between the State of New Jersey and the said Gerardo Traficanto, as it is said, manifest error hath intervened to the great damage of the said Gerardo Traficanto, as from his complaint we have received information, we being willing, in his behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Gerardo Traficanto, command you 40

10 that if judgment be thereon given, then that you distinctly and openly send under your seal the record and proceedings aforesaid, with all things touching the same, and the entire record of the proceedings had upon the trial, to our Court of Error and Appeals, in the last resort in all causes of law, to be held at Trenton, on the 10th day of October, next, and this writ that the record and proceedings as aforesaid being inspected we may further cause to be done thereupon for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

WITNESS, Edwin Robert Walker, Esq., our Chancellor and the President Judge of our said Court of Errors and Appeals, at Trenton, New Jersey this twentieth day of September, 1928.

20 Joseph F. S. Fitzpatrick,
Clerk.
HAROLD SIMANDL,

Attorney for Defendant.
Presented in open Court this 27th day of
Sept., 1928.

Dallas Flannagan,
Judge.

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STATE OF NEW JERSEY }
 COUNTY OF ESSEX } ss.

I, Dallas Flannagan, Judge of the Court of Common Pleas holding the Oyer and Terminer Court in and for the County of Essex, New Jersey, do hereby certify and return to the Court of Errors and Appeals the court of last resort in this State, the Indictment, Judgment Record and Proceedings together with the entire record of the Proceedings had at the trial and all things touching and concerning the same as by the within writ to me directed, I am commanded.

10

IN WITNESS WHEREOF I have hereunto set my hand and the affixed seal of said Court at Newark, N. J., this day of October, A. D. 1928.

DALLAS FLANNAGAN,
 Judge of the Court of Common
 Please holding the Court of Oyer
 and Terminer, Essex Co., N. J.

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(SEAL)

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INDICTMENT

STATE OF NEW JERSEY }
 COUNTY OF ESSEX } ss.

10 BE IT REMEMBERED, that a court of Oyer and
 Terminer, holden at Newark, in and for the
 County of Essex on the first Tuesday in April, in
 the year of our Lord, one thousand nine hundred
 and twenty-eight, by the Honorable William S.
 Gummere, Chief Justice of the Supreme Court
 of Judicature of the State of New Jersey, and
 holding the said Court of Oyer and Terminer, in
 and for the County of Essex, New Jersey by the
 oath of William Hoffman, Thomas F. Halpin,
 Frederick Hochbaum, V. J. Rizzolo, William G.
 Kendall, David Dreyfuss, Alexander Harris, Mor-
 ris W. Grashof, Samuel Klein, Daniel W. McGee,
 20 Harry Boutillette, Charles D. Brady, I. M. William-
 son, John G. Whittier, Charles Robinson, Robert
 L. Weingarten, Richard Hartdegan, Bernard J.
 Owens, George A. Guenther, Stephen E. Raube,
 William B. Trethaway, R. B. Stoutenburg, William
 Stanton, good and lawful men of the said County
 of Essex, duly summoned and then and there duly
 sworn, and charged to enquire in behalf of the
 State of New Jersey in and for the said County of
 Essex, it is presented in manner and form follow-
 30 ing, to wit:

Essex County, to wit:

The Grand Jurors of the State of New Jersey,
 for the County of Essex, upon their oath present
 that Gerardo Traficante and Joseph Caputo on
 the tenth day of March, in the year of our Lord
 one thousand nine hundred and twenty-eight, at
 the City of Newark, in the County of Essex afore-

said did wilfully, feloniously and of their malice aforethought, kill and murder Anniello Tamburo, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignitty of the same.

Joseph L. Smith,
Prosecutor of the Pleas.

And on the twenty-fifth day of April, A. D. nineteen hundred and twenty-eight, on which day the said Indictment was presented by the Grand Jury aforesaid to the said Court of Oyer and Terminer, the said Justice did then and there order the said Indictment to be delivered to the Clerk of the Court of Oyer and Terminer in said County and then and there the said indictment was delivered and duly filed by said Clerk and an entry of such delivery and filing was then and there made in the minutes of said Court, at the same time pursuant to the statute in such case made and provided.

Plea

And afterwards, that is to say, at the same session of the Court of Oyer and Terminer holden at Newark on the third day of May, A. D. Nineteen hundred and twenty-eight, before the Judge aforesaid, comes the said Gerardo Traficanto in the custody of Conrad Deuchler, Sheriff of the County of Essex aforesaid, in the above custody in the Jail of the County aforesaid, being brought to the Bar of this Court in his own proper person by the said Sheriff to whom he is also committed and having heard the indictment and being forthwith demanded of and concerning the premises in the above indictment specified and charged upon

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him how he would acquit himself thereof, says that he, Gerardo Traficante, is Not Guilty thereof and therefore, for good and evil he put himself upon the Country and Joseph L. Smith, Prosecutor of the Pleas for the County of Essex aforesaid, who prosecutes for the State of New Jersey in this behalf doth the like.

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Minutes of Proceedings

Therefore, let a Jury thereupon come before the Judge aforesaid, at Newark aforesaid, in the County of Essex, at the same session of the Court of Oyer and Terminer aforesaid on the fourteenth day of May, A. D. nineteen hundred and twenty-eight, twelve free and lawful men each of whom shall be a citizen of this State and a resident within the County of Essex aforesaid, above the age of twenty-one years and under the age of sixty-five years by whom the truth of the matter may be better known and who are not of kin to the said Gerardo Traficante, impl. to recognize upon their oath, whether the said Gerardo Traficante is Guilty of the Murder in the indictment aforesaid specified or Not Guilty because as well the said Joseph L. Smith, Prosecutor of the Pleas of the County of Essex aforesaid who prosecutes for the State of New Jersey in this behalf as the said Gerardo Traficante has put himself upon the Jury and the same day of given to the parties aforesaid, at the same place, at which day, to wit, the fourth day of June, A. D. nineteen hundred and twenty-eight on which day said trial was moved, a motion for severance of trial having been made was heard by the Court which motion was denied and at the same Term of Oyer and Terminer holden at Newark aforesaid, in the County of Essex, before the Honorable Dallas Flannagan, Judge of the Court

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of Common Pleas, holding the Court of Oyer and Terminer, in and for the said County of Essex, comes as well the said Joseph L. Smith, Prosecutor of the Pleas, who prosecutes aforesaid, and the said Gerardo Treficanto, in the custody of Conrad Deuchler, Sheriff of the County aforesaid, being brought to the bar in his own proper person, by the said Sheriff and the Jurors of the Jury by the said Sheriff for this purpose empanelled and returned, after the following challenges were made by defendant, Gerardo Traficanto, 10 by the State 8, by consent 9 and by the Court 3, to wit: 1 Walter Monk, 2 Charles A. Blood, 3 Wililam M. Engleman, 4, Howard D. Brainard, 5, John C. Warner, 6, Albert W. H. Carpenter, 7, Samuel P. Ledgard, 9, George M. Baumeister, 10, Huyler Hault. After Juror No. 10 was sworn, the Special Panel becoming exhausted the Court order the remainder of the panel drawn from the General Panel and sworn as Jurors No. 11 and No. 12, 11, Christian L. Fautz, 12, Edgar I. Freeman, being called come and were sworn on that Jury who to speak the truth of and concerning the premises and thereupon the trial of the issue commenced and continued before the said Court and Jury, from day to day until the sixth day of June, A. D. nineteen hundred and twenty-eight at Newark aforesaid, the Jury in the meantime being all that time kept together and in the care of officers of the said Court, who were selected and duly sworn by said Court for that purpose, at which last mentioned day the said issue after a charge from said court was submitted to the said jury, and the said jury in charge of said officers of said Court for that purpose were taken to a private room to consider of their verdict, and afterwards, that is to say, on the day before said, at Newark, the said Jury returned into and before the said

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Court in charge of the said officers sworn to keep them in charge, and then and there in the presence of the said Prosecutor, Joseph L. Smith, and the said Gerardo Traficante say "We find the defendant Gerardo Traficante, guilty of murder in the first degree and recommend imprisonment at hard labor for life" and so they say all.

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Verdict and Judgment

By direction of the Court the jury was polled and when the roll was called, each juror for himself answered "Guilty of Murder in the first degree and recommended imprisonment at hard labor for life."

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Whereupon, all and singular the premises being seen, and by the Court now here fully understood, it is, on this sixth day of June, A. D. nineteen hundred and twenty-eight, Ordered and Adjudged that Gerardo Traficante be imprisoned in the State Prison of this State, at hard labor for life.

And the defendant be in Mercy etc.

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Judgment signed
June 6, 1928.

Dallas Flannagan,
Judge.

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ESSEX COUNTY COURT OF OYER
AND TERMINER

THE STATE OF NEY JERSEY —vs— JOSEPH CAPUTO, et. als.	}	Sur Indictment for Murder. DEMAND FOR BILL OF PARTICULARS	10
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To:—

JOSEPH L. SMITH, ESQ.,
 Prosecutor of the Pleas,
 Court House,
 Newark, N. J.

SIR:—

The defendant, Joseph Caputo, hereby demands that you furnish him with particulars with respect to the indictments lately found by our Essex County Grand Jury, wherein Joseph Caputo and another are charged with having of his malice aforethought, feloniously, wilfully and premedately killed one Amiellio Tamburro on the 10th day of March, Nineteen Hundred Twenty-eight: 20

1. Give particulars as to the means used in killing the deceased, stating the kind and size of the weapon which caused the death.

2. State whether the deceased suffered a mortal wound or wounds, and where, on the body of the deceased, said mortal wound or wounds were inflicted by the defendant and by what means said mortal wound or wounds were inflicted. 30

3. State with particularity the time and place of said crime.

4. State whether said mortal wound or wounds was delivered by the defendant or another.

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5. Describe the weapon or weapons which are alleged to have caused the death of the deceased.

6. Give particulars as to whether the killing was committed during the perpetration or attempted perpetration or arson, burglary, rape, robbery or sodomy.

10 7. Give particulars as to whether or not the murder was perpetrated by means of poison or by lying in wait.

8. State whether the defendant is charged as a principal or as an accessory.

9. If as an accessory, state whether before or after the fact.

HAROLD SIMANDL,
Attorney of the Defendant
Joseph Caputo.

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ESSEX COUNTY COURT OF OYER
AND TERMINER

<p style="text-align: center;">THE STATE OF NEY JERSEY —vs— JOSEPH CAPUTO, et. als.</p>	}	<p style="text-align: center;">Sur Indictment for Murder. ANSWER TO BILL OF PARTICULARS.</p>	10
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To Harold Simandl, Esq.,
Attorney for Joseph Caputo,
Chamber of Commerce Building,
Newark, N. J.

1. Deceased was killed by means of a .32 calibre steel jacketed bullet fired from an automatic pistol and by two .22 calibre lead bullets fired from a revolver. 20

2. Deceased suffered three mortal wounds by the means aforesaid in the right anterior chest, left anterior chest and left lower abdomen. The defendant, Joseph Caputo, at the time and place hereinafter set forth, fired three shots. However, the State contends that none of these entered the body of the deceased.

3. The crime was committed on the 10th day of March, 1928, at about 10:45 P. M., on the first floor of a building in the rear of premises 72 Hayes Street, Newark, N. J., in the flat occupied by the defendant, Joseph Caputo. 30

4. The mortal wounds were delivered by the defendant, Gerardo Traficanto, who was then and there in unlawful conflict with the defendant, Joseph Caputo. 40

5. The weapons employed in the murder were a .32 calibre automatic pistol No. 16872 of Spanish manufacture, and a .22 calibre revolver of X. L. double action, Hopkins and Allen brand.

6. The murder was committed for none of the reasons set forth in this paragraph of the Bill of Particulars.

10

7. The murder was not committed by poison or by lying in wait.

8. The defendant is charged as a principal.

JOSEPH L. SMITH,
Prosecutor of the Pleas.

FRANK B. BOZZA,
Assistant Prosecutor.

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Exhibit S-23)

DEPARTMENT OF PUBLIC SAFETY.

Police Division.

Newark, N. J., March 12, 1928.

Voluntary Statement of Gerardo Traficanto

Residence 72 Hayes St.

Occupation Laborer

Age 54

Statement Made to Detective Coccozza and
Raffaele Capodanno.

10

About 9:30 a. m. Saturday morning March 10th, 1928, a lady came to my house called Louisa Waldron that always comes once every week to clean the house and after she was finished washing my clothes and cleaning my house about 3:00 p. m., Saturday afternoon she went in the house of Joseph Caputo, who lives in the same house that I live in but in the apartment across from me. When I went and bought some meat and when I returned I went and called her and she answered "Wait a minute" and I went back into my house. After I called her three or four more times about 5: p. m., I went and called her again and she told me to go to hell so I slapped her in the face and Joseph turned angry against me and I went back into my house and he told me to take another woman that they call Marie and I took her with me and she went right into my bed with all her clothes on and after a little while she started a fracas and I immediately went over to Joseph and told him that he should come over and take her to his house because I wanted to go to Bank St. As soon as I said these words Joseph and his friends started to strike me. And when I heard three shots of a revolver I pulled my

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revolver out which is a .22 calibre revolver from my right rear pocket of my trousers and I fired five or six shots from the revolver while I was going out of the kitchen door and I went into my apartment and I put the revolver that I had shot in the drawer of the bureau and I took the Smith and Wesson revolver of .32 calibre from the drawer and I put it in my pants pockets and started to go towards Bank St., when I was arrested, I identified the Smith and Wesson revolver No. 2363 the one that I had on my pocket when I was arrested. The X. L double action Hopkins and Allen Arms revolver No. 22321 of 22 calibre, the one that I used to the shotting in the house of Joseph Caputo and put in the drawer. The .32 calibre Spanish automatic belongs to Louisa Waldron and she left it with me when she came to do the house cleaning Saturday morning and I put it in the drawer of the bureau. One green box of Cartridges, 32 cal. is mine and I have had it for a year and a half, the orange box of 32 cal. cartridges I bought same for Louisa in a store on Mulberry St., in New York City, November, 5, 1927, and paid \$2.85 for fifty cartridges.

Signed,

Gerardo Traficanto.

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(Exhibit S-24)

DEPARTMENT OF PUBLIC SAFETY.

Police Division.

Newark, N. J., March 12, 1928.

Voluntary Statement of Giuseppe Caputo:

Residence: 72 Hayes Street,

10

Occupation: Laborer,

Age: 47 years.

Statement made to: Detective Joseph Coccozza
and Raffaele Capodanno.

About 6:00 p. m. Friday, March 9, 1928, I met Annielo Tamburro at the corner of 14th Avenue and Hayes Street, and Tamburro asked me if I would let him sleep a night in his house because he had an argument with his wife on the night previous. And the night before he slept in a car belonging to a baker near his house and I brought him to my house where he slept Friday night.

20

Tamburro went and pawned several articles in a pawnshop and returned to my house. About 2:00 p. m. Saturday, March 10, 1928, Mrs. Laura Smith and Mary Brennan came to my house and Mrs. Smith asked me for a sweater and a coat and the two of them sat down in a kitchen. They made a sandwich out of meat and we finished half gallon of wine. In the meantime while we were eating Louisa who does work next door came in and she also had a sandwich of meat and a little wine. Gerardo Treficanto who lives in the apartment across from me came in my house and I invited him to have something to eat with us and he said "no" and back into his house took a coat belonging to Louisa Waldron and threw it in her

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face and went out. About 9:00 p. m. Gerardo came into my house again because the kitchen door was open and slapped Louisa in the face and Louisa said, "You no my husband, why do you for that for?" and I told Gerardo this you should not do in my house, this you should do in your house. Gerardo came towards me and grabbed me with his hands and told me, "I'll do to you the same as I done to the policeman two years ago, I'll grab you be the balls and send you to the hospital." When I heard Gerardo talk like this I grabbed him by the chest and I threw him near the stove, Aniello Tamburro got between us and tried to separate us and I don't know if Tamburro hit me or not. Gerardo went out and I told them all to get out because I wanted to go out also and while I was saying this I saw Gerardo near the kitchen door with a revolver in his hand and shooting my way. 10
20 Tamburro who was in front of me said, "Joe, Joe, he killed me and I ran to my bedroom opened my trunk and my revolver because I wanted to go and call the police the front door. And when I saw that he was not watching me I threw the revolver on the bed and ran out of the window and I went out from the yard next door and went to the pool room 291—15th Avenue, of Benny Neri and I told them to call the police because Gerardo Treficanto had shot someone in my house. 30
Several young men from the poolroom came with me to my house and then police came and arrested me. The 32 cal. revolver is the one I took from the trunk and is now at police headquarters and identified by me.

His
Signed, Giuseppe (X) Caputo.
Mark

*Opening*ESSEX COUNTY COURT OF OYER AND
TERMINER.

Monday, June 4, 1928.

STATE OF NEW JERSEY,	}	On Indictment	10
vs.		No. 422 Apr.T.1928 for Murder	
GERARDO TREFICANTO and JOSEPH CAPUTO			

Before Hon. Dallas Flannagan, Judge, and a jury. 20

For the State appears Frank B. Bozza, Third Assistant Prosecutor of the Pleas of Essex County.

For the defendant Gerardo Treficanto appears William A. Wachenfeld.

For the defendant Joseph Caputo appears Harold Simandl.

(The trial proceeds in the Judge's chambers.)

Counsel for the defendant Caputo, waiving the presence of his client, withdraws the plea of not guilty, objecting to jointly pleading on the ground that this is not a joint act as is evidenced by the bill of particulars. The objection is noted and the plea of not guilty is reinstated. 30

Counsel for the defendant Caputo moves for a severance on the ground that the interests of the respective defendants are antagonistic. 40

Motion For Severance

Counsel for the defendant Treficanto moves for a severance on the ground that the interests of the respective defendants are hostile and adverse to one another.

(Argument.)

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Motions denied.

Exceptions to this ruling of the Court allowed; let them be sealed and they are signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

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Case

(The trial proceeds in the courtroom.)

THE COURT. As I understand it, the pleas of not guilty are reentered and the motion in each case denied and an exception granted in each case to counsel.

(The following talesman having been duly sworn on his voir dire, is questioned as follows:)

10

HARRY L. CONDIT, called.

BY MR. BOZZA.

Q Have you any conscientious or religious scruples against capital punishment?

A I have not.

Q Murder in the first degree is punishable in this State by death by means of electrocution. Would you fail to bring in in a proper case a verdict of murder in the first degree because of any conscientious scruples, religious or otherwise?

20

MR. WACHENFELD. I object. Improper question.

THE COURT. You mean it is not an accurate statement?

MR. WACHENFELD. I object because it is improper in form and because the State gives the jury the right to determine what the punishment shall be. It is not what the prosecutor has said it to be.

30

THE COURT. Well, it is punishable under some circumstances, that is, if the jury so decides; if the jury bring in a verdict of first degree murder, then it is punishable. That is right.

40

Case

10 MR. BOZZA. I will state now on the record, in order that I may not reiterate it in every question, that the State appreciates that the law is that murder in the first degree is punishable by death, by means of electrocution, unless the jury brings in a recommendation of mercy of life imprisonment, and then it will be that sentence and nothing else, but my questions are directed to these talesmen solely for that part of the law which deals with murder in the first degree. I am not touching upon the recommendation of the jury, which is in their judgment.

20 MR. WACHENFELD. I renew my objection. I also object to the speech of the Prosecutor and I say it is not within the province of the Prosecutor to tell the jury what the law is. It is in the province of the Court.

THE COURT. Well, the jurors will take that into consideration.

Q (Question read.)

30 THE COURT. I will allow the question. Counsel for the defendant Treficanto prays an exception to this ruling of the Court. Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

A I would answer as I did before.

Q Now, assume that two men are firing at each other and that—

40 MR. SIMANDL. I object to any statement involving an assumption of fact.

Case

THE COURT. No. Do not go into recitation of the evidence. Make it short.

Q If the State proves to you that two men are duelling—

MR. SIMANDL. I do not think that is fair of the Prosecutor to go into any such recitation of fact in order to find out a juror's qualification. Certainly the jury is not asked to pass upon what he is going to do in the trial of the case by the preliminary questions. 10

THE COURT. No, I think you are going into the question of law which involves the case on trial. The juror has said he has not conscientious scruples against capital punishment and in a proper case he would bring in a verdict of guilty. 20

(Argument.) I will sustain the objection.

Q Do you know of any reason why you could not sit in judgment of this case and decide it from all the evidence, the charge of the court, fairly and impartially?

A I do not.

BY MR. SIMANDL.

Q Would you be prejudiced against the defendant Joseph Caputo because he is an Italian? 30

A No.

Q Are you related to or in any way acquainted with the Prosecutor of the pleas or any of his detectives connected with his office?

MR. BOZZA. I object.

THE COURT. I will allow it.

A (Not answered.)

MR. SIMANDL. I will excuse the juror. 40

Case

(After nine jurors have been sworn, the following talesman is examined on his voir dire.)

F. RAYMOND BREWSTER called.

10 BY MR. SIMANDL.

Q Your business is what?

A Accountant, American Telegraph Company.

Q Would you give the defendant the benefit of a reasonable doubt on all the evidence?

A I would.

Q Do you know of any reason why you cannot try this case fairly and squarely?

A No.

20 BY MR. BOZZA.

Q Have you any scruples against capital punishment based upon conscientious or religious reasons?

A I have.

Q And are your scruples so thoroughly imbedded that you would not take the evidence and the charge of the Court and arrive at a proper verdict?

A I would render a verdict, but it would carry with it a recommendation if the defendant were found guilty.

30 MR. BOZZA. I challenge for cause.

MR. WACHENFELD. I object.

THE COURT. You mean to say under no condition would you bring in a verdict of guilty of murder in the first degree without a recommendation?

WITNESS. That is right.

40 THE COURT. You are excused.

Case

Counsel for the defendant Treficanto prays
an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is
signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

10

Mr. Bozza opens for the State as follows:

May it please the Court and gentlemen of
the jury. The defendant, Gerardo Treficanto
and Joseph Caputo, sitting between the two
court attendants at that railing, the one near-
est you is Gerardo Treficanto and the one
further away from you is Joseph Caputo, come
before you for trial today on a charge of
murder, by virtue of an indictment returned
against them by the Grand Jury of this
County charging that on the 10th day of
March, in the year of our Lord, one thousand
nine hundred and twenty-eight, in the City of
Newark, they did wilfully, feloniously and of
their malice aforethought kill and murder one
Ammello Tamburro.

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The state will prove to you, gentlemen of
the jury, that on the date allegea in this
indictment, the 10th day of March, 1928,
Gerardo Treficanto and Joseph Caputo resided
in a building in the rear of premises 72-Hayes
street, Newark, New Jersey; that Treficanto
occupied two rooms on the first floor to the
right of this building in the rear of premises
72 Hayes street, and that the defendant
Joseph Caputo occupied two rooms to the left
on the first floor of this building; that on the
9th day of March, 1928, before the day of
the murder, the deceased, Ammello Tamburro,

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Case

met the defendant Joseph Caputo at the corner of 14th avenue and Hayes street and asked him if he could not secure a night's lodging with him because he did not desire to go home and the defendant Caputo consented; and on the following morning, about ten o'clock, Louise Waldron visited the rooms of Treficanto, as was her custom, to do for several months, to do some general housecleaning for him, and a Mary Brennan that same morning, as was her custom to do for months, went to visit Joseph Caputo to do some housecleaning for him. She came there, Louise Waldron to the rooms, of Treficanto and completed her cleaning of Treficanto's house at approximately noon time; that Treficanto had gone out to purchase some food stuff and returned with some cooked fish about two o'clock that afternoon and Louise Waldron and Treficanto in their rooms ate this meal; that Louise left the apartment of Treficanto and went across the hall into the apartment of Joseph Caputo, where she found the defendant Caputo and Ammello Tamburro, a Mrs. Mary Brennan, a Miss Laura Smith from New York, who had come to Caputo's apartment to take some clothes that she had left there some time prior to the date of the murder, and they sat down and had some meat sandwiches and drank some wine; Treficanto after some time went to Joseph Caputo and asked this Louise Waldron, his housekeeper to come back into his rooms, which she refused to do. This provoked and incensed him, and he went back into his rooms and took her coat and scarf and came into Caputo's room and threw them at her and said, "If you don't want to come, you stay there," and

Case

a quarrel ensued between Louise Waldron and Treficanto, whereupon Treficanto slapped her in the face and left. He returned several hours later and saw that Louise Waldron was still in the rooms of Joseph Caputo and asked her to come back into his house and she refused to do so, but Mrs. Mary Brennan went with him and Mrs. Mary Brennan went into the bed of Gerardo Treficanto while Louise Waldron, Treficanto's housekeeper, went into the bed of Caputo, but Mary Brennan was disagreeable in Treficanto's rooms, did not want to do what Treficanto requested of her, and he came back into Caputo's house to tell him that Mary Brennan is raising a disturbance in his rooms, whereupon Caputo either attacked or was about to attack Treficanto and Treficanto goes into his rooms and secures a gun, a 22 calibre revolver, which will be put in evidence, and secures a 38 Spanish automatic pistol and as he stands in the doorway of the kitchen of Caputo's apartment, while Caputo was in the doorway between the kitchen and his bedroom concealing Louise Waldron, who was on the bed, Treficanto pulled his gun, and when he did so, Caputo went to the trunk in the bedroom, pulled out his revolver and there was a pistol duel between Treficanto and Caputo. Caputo fired three shots, which went wild of their mark. Treficanto fired at that time and at that place three shots. He fired two from his 22 calibre revolver and one from his Spanish automatic and each of these three bullets struck the body of Ammello Tamburro, who was in the house and who the State contends was an innocent by-stander and not a participant in

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Case

10 this case at all. This was an invited guest of the night before, and the State will prove to you that Ammello Tamburro secured a wound in the right anterior breast, another wound in the left anterior breast and another wound in the lower abdomen, which caused his death; that Treficanto immediately took flight and when he took flight, Caputo, the State contends, ditched his gun and took another gun which was fully loaded and undischarged—

MR. SIMANDL. Caputo ditched his gun?

20 MR. BOZZA. Yes. Then Treficanto goes into his room and he deposits his gun there and takes another gun that is fully loaded and he was afterwards apprehended in the restaurant and so was Joseph Caputo, and in a search of the rooms of Treficanto the State secured a 32 calibre Spanish automatic pistol containing a magazine with seven loaded bullets and one bullet in the chamber indicating that one had been exploded and a 22 calibre revolver with two loaded bullets and five discharged shells and two boxes of 32 calibre bullets. In Caputo's room was found a 32 calibre revolver in bed with chamber empty, no shells, and four or five loaded chambers. The women were there all with the exception of Louise Waldron who made her way out the front door after the shooting and who went home and was apprehended by the State, and you will receive her testimony as to this entire episode, and the State contends in this case while Caputo and Treficanto were engaged in his unlawful conflict in this pistol duel intending to kill each other, that the bullets of Treficanto went wild of their mark and into the body of Ammello Tamburro. The

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Case

State does not contend that either of them sought to kill Ammello Tamburro, but that the law will fix the unlawful intent, criminal intent, upon these defendants, even though a person whom they did not seek to kill was killed, and you will receive that explanation of the law from his Honor, in his charge and throughout the course of the trial. The State does not contend that the bullets of Caputo, the three shots that were fired, entered the body of this deceased; that at the time the deceased sustained these three he was facing the door which led from the corridor into the kitchen and it was in the direct line of range of Treficanto. Now, when the State proves these facts to you, gentlemen of the jury, we will ask you to find both of these defendants guilty as charged.

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State's Witness, John J. Bracken, Direct

JOHN J. BRACKEN sworn in behalf of the State
DIRECT EXAMINATION by Mr. Bozza.

Q You are the official engineer and surveyor of the Prosecutor's office of Essex County?

10 A Yes.

Q And in your official capacity, did you go to the premises 72 Hayes street, Newark, New Jersey?

A Yes.

Q And when?

A The date is on the map.

MR. WACHENFELD. March 14, 1928.

Q Will you please step down to this map? March 14, 1928. And did you make a survey of the premises?

20 A Yes.

Q Now, will you please explain this map, beginning with the word Hayes street and that perpendicular line?

A The line shown on Hayes street is the curb line. The line of the house is number 72, facing on Hayes street, showing 11 and .70 feet back from the curbline. In here is an alleyway entering into the rear of those houses, showing the different buildings that are along that rear yard, and here we have two apartments with a small brick construction in the rear here and different rooms and different objects in the rooms are shown in those apartments, showing the hallways and whatever else was in there. The scale of the map is one half inch on the map equals a foot on the ground.

30

Q Now, in order to gain access to the rear building, what course would you take from the sidewalk? This is on the easterly side of Hayes street?

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State's Witness, John J. Bracken, Direct

A Yes.

Q And what course would you have to take to get into the rear building?

A Come right through this alleyway right on through.

Q And that would lead to what?

A That would lead you to this doorway in the hall.

10

Q And on either side of this doorway are apartments?

A Yes.

Q Of how many rooms each?

A They just have two rooms each.

Q Two rooms on one side and two rooms on the other side?

A Yes.

Q Now, does this indicate a window?

20

A This indicates a little extension. This was used as a toilet.

Q Is this a window?

A Yes.

Q And is this a window?

A Yes.

Q And that a window?

A Yes.

Q And there is a window here, from the bedroom?

30

A As shown.

Q Now, will you please tell us what these squares are?

A The squares are marked, "Table, stove, sink, chest, chair, bed and dresser, table, ice-box." They are all marked, "stove," and so forth.

MR. WACHENFELD. I take it Mr. Bracken's testimony is as of the time he made the map.

40

State's Witness, John J. Bracken, Direct

MR. BOZZA. Yes, only as of the time he went there.

10 Q Now, will you please tell the Court and jury how you gain access to Treficanto's apartment once you are in the hall of that building and how you gain access to Caputo's?

A Where is Treficanto's?

Q On the right hand side.

A On this side here and the doorway right opposite.

Q And how many stories to this building?

A Two stories.

Q And this is the map of the first floor?

A That is a map of the first floor.

20 Q What kind of a building is out here in front?

A That is a frame building with a store in front of it.

Q And how far is the entrance to that building from the easterly curb?

A 81.7 inches; about eighty-two feet.

Q Now, then, is this a clear opening, or is there some—

A There are old frame sheds and buildings along here.

30 Q And how high are the roofs of these buildings, do you know, from the walk of the alley?

A My information is they are about ten or twelve feet.

Q And do those roofs obscure the window of this apartment?

A They do at certain points; it would depend upon where you were.

Q And, now, is the roof above the top of the window, or below it?

40 A Above the top of the window, to my recollection.

State's Witness, John J. Bracken, Direct

Q Now, do you know if anyone coming out of that window could get out of this alleyway or would he have to come around to Hayes street?

A Well, the only way you could get over to this alleyway would be to do some climbing.

CROSS EXAMINATION by Mr. Simandl. 10

Q How wide are the doors leading from the hallway into the kitchen?

A They are two feet and a half.

Q How many?

A Two feet five and a half inches.

Q How much distance is there from the further end of the wall on the inside of the kitchen to the window casing? From this point on the inside wall of the kitchen right over to there, how far is that? 20

A That is a foot and a half.

Q As you walk in the courtyard here, you walk up, one, two, three steps, do you not?

A Yes.

Q Stone steps?

A Yes.

Q How far is it from this door leading from the outside to the inside corridor to a point at the nearest point of the doorway leading into the kitchen? 30

A Right here you mean?

Q Yes.

A Three feet.

Q It is three feet from this point here to there?

A Yes.

Q How far is it from the doorway, the furthest point of the doorway to that doorway?

A Well, do you want that point or in on the angle? 40

State's Witness, John J. Bracken, Direct

Q In on the angle?

A That would be three feet ten inches.

Q This does not show all of the stove; there are some legs on that stove?

A No, sir; there are some legs on there.

10 Q You have not put any there where they extend?

A Yes, that is the over-all of the stove. That is taking in the shelving.

Q Yes, and then it curls up in that fashion?

A Yes, and I usually take the outside measurements of the stove.

Q How far is it from the furthest point of the side of the door?

A That is five feet and ten inches.

20 Q Now, how far is it from the point of the bed to the wall?

A That is four feet.

Q How much space is there between the end of the window and that doorway?

A A foot and two inches.

REDIRECT EXAMINATION by Mr. Bozza.

Q Is there a door that is between the kitchen and the bedroom of Caputo's apartment?

A This is a door here, yes.

30 Q And is there a door on its hinges?

A No, there is a doorway.

Q Now, what is the distance between that doorway and the trunk in Caputo's room?

A To the nearest corner of the trunk, it is eight feet.

Q Now, will you please tell us what that oblong object is on the side of the corridor right next to the kitchen door of Caputo's apartment?

A That is, right?

40 Q Yes.

State's Witness, John J. Bracken, Cross

A That is an ice box.

Q And that hugs the wall?

A As close as you can get to it.

Q Now, how many steps are there to that rear house leading to the corridor?

A There are three steps up there.

Q That is excluding the top one?

10

A That is the platform.

Q Three steps to the platform?

A Yes.

CROSS EXAMINATION by Mr. Wachenfeld.

Q What are the approximate measurements of what I would call the kitchen; is that what you call it?

A Yes.

Q Well, what would you say were the approximate dimensions of that?

20

A It is nine feet nine, square.

Q What about the size of the bedroom?

A The bedroom is nine feet long and is eight feet and a half the other way.

RECROSS EXAMINATION by Mr. Simandl.

Q The bed blocks the window, doesn't it, completely?

A The bed is in front of the window.

Q Right up against the wall?

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A Right up against the wall.

Q And the window is entirely blocked, you cannot get access to the window without going on to the bed?

A No.

REDIRECT EXAMINATION by Mr. Bozza.

Q But the top of the bed is no higher than the sill of the window?

A No, it is lower than the sill.

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State's Witness, John L. Day, Direct

(Map offered in evidence and marked Exhibit S-1.)

JOHN L. DAY sworn in behalf of the state.

DIRECT EXAMINATION by Mr. Bozza.

10 Q You are the official photographer for the Prosecutor's office of Essex County?

MR. SIMANDL. I will admit his qualifications.

A I am.

Q And in the capacity of your admitted qualifications did you go to the premises 72 Hayes street and take photographs of different portions of the premises?

20 A Yes.

Q And when did you go?

A On the morning of March 11.

Q And that is the morning following the murder?

A Yes.

Q Now, I will give you these photographs and ask you to tell us one by one what they are.

A this is the kitchen in the rear of 72 Hayes street, in the right apartment.

30 MR. SIMANDL. I object to any testimony or any admission of any photographs on the right hand side apartment because, as a matter of fact, I do not think they are material in this case at all, and they can only confuse. I have been looking at the pictures and I do not think until the occasion arises, it is necessary to put anything in the right apartment. It is admitted that the action took place in the left apartment.

40

State's Witness, John L. Day, Direct

MR. WACHENFELD. I have no objection except that they were taken at the time that the pictures state.

MR. BOZZA. You will find in Treficanto's bureau, between the bureau and the bed, some significant things there and to show the general course that Treficanto took going from it and going to it, and to give the jury the benefit of the whole general physical features there on both sides of that corridor. 10

THE COURT. Very well, go ahead.
Counsel for defendant Caputo prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly. 20

DALLAS FLANNAGAN,
Judge.

THE COURT. When did you go there and when did you make these?

WITNESS. On Sunday morning.

THE COURT. What time?

WITNESS. About nine or ten o'clock.

THE COURT. Have you any testimony to put in to show there was no change in the physical condition between the visits of Mr. Day and the time of the killing? 30

MR. BOZZA. Yes, sir. The police officers that were there and saw the premises.

THE COURT. If you can fill that in, I will allow it with that understanding.

MR. BOZZA. All right. 40

State's Witness, John L. Day, Direct

Q Now, that is the kitchen of the right apartment?

A Yes.

MR. BOZZA. Is it stipulated that that is Treficanto's kitchen?

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MR. WACHENFELD. I don't know. If you say so, I will stipulate it.

(Photograph offered in evidence and marked Exhibit S-2.)

THE COURT. Admitted subject to it being shown subsequently that there was no change.

Counsel for defendant Caputo prays an exception to this ruling of the Court.

20

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

A This is looking in the bedroom in the rear of the kitchen of 72 Hayes street, in the right hand side apartment.

(Photograph offered in evidence and marked Exhibit S-3.)

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MR. SIMANDL. The same objection.

THE COURT. Subject to the same conditions. It will subsequently be shown there was no physical change since the killing.

Defendant Caputo's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

40

State's Witness, John L. Day, Direct

(Photograph offered in evidence and marked Exhibit S-3.)

A This is a view of the front of the rear building at 72 Hayes street. It was taken about just under the shed of the wooden building in the front.

(Photograph offered in evidence and marked Exhibit S-4.)

10

A (Continuing) This is the kitchen on the left-hand side apartment.

MR. BOZZA. Is it stipulated that the kitchen in the rear of 72 Hayes street to the left is Caputo's apartment?

MR. SIMANDL. As far as I am concerned. That is, of course, subject to the same general proposition.

20

THE COURT. Yes, subject to the same condition; it must be connected.

(Photograph offered in evidence and marked Exhibit S-5.)

A (Continuing) This is looking into the bedroom from the kitchen in the left hand apartment of 72 Hayes street.

(Photograph offered in evidence and marked Exhibit S-6.)

30

Q And this one?

A This is looking from the bedroom into the kitchen in the left hand apartment in the rear of 72 Hayes street.

(Photograph offered in evidence and marked Exhibit S-7.)

Q And who is that a picture of and where did you take it?

40

State's Witness, John L. Day, Direct

MR. SIMANDL. I object.

THE COURT. No. How does he know? He may testify where he took it, unless he knew the man.

10 Q Where did you take this picture and under what circumstances and at whose request did you take it?

A The picture was made at Holle's morgue and I made it at the request of the Prosecutor's detective.

Q And who were present when the picture was taken?

A I believe Detective Cocozza and Detective Harris and the morgue keeper and I believe Dr. Martland was there at the time.

20 Q And were you told who that person was?

MR. SIMANDL. I object.

THE COURT. Sustained.

MR. BOZZA. I offer it in evidence for what it is worth up to that point.

MR. SIMANDL. I object.

30 THE COURT. Sustained.

MR. BOZZA. May I withdraw this witness and have this identified?

THE COURT. Certainly.

MR. BOZZA. Will you please step down from the stand?

MR. SIMANDL. May I cross examine the witness as far as he has gone?

40 THE COURT. Yes.

State's Witness, John L. Day, Cross

CROSS EXAMINATION by Mr. Simandl.

Q I show you Exhibit S-7, which purports to be a picture of the kitchen looking from the bedroom in the left hand apartment, is that right?

A Yes.

Q I show you a chair at the door; did you place 10
that chair there?

A No, sir.

Q Who did, do you know?

A I don't know. It was there at the time I was there.

Q Did you open the door?

A I didn't.

Q Do you know who opened the door?

A No, sir.

Q Was the door open when you got there? 20

A It was open.

Q Was there anybody there when you got there?

A Yes, an officer from the fourth precinct.

Q Do you know whether he opened it so that you could get in?

A I don't know.

ANTHONY N. LaPORE sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza. 30

Q Where do you live?

A I live 14 Oregon street.

Q Newark?

A Maplewood.

Q Do you know Amello Tamburro?

A Yes, I did.

Q How did you know him?

A He is my step-father.

Q I show you a photograph and ask you to look 40

State's Witness, Anthony N. LaPore, Direct
at this photograph and tell the court and jury
who that is a picture of?

A That is a picture of my step-father.

Q What is his name?

A Ammello Tamburro.

MR. BOZZA. I offer it.

10 MR. SIMANDL. I object on the ground it
can have no other use after the county physi-
cian testifies than to incite the jury. I do not
see how it can be material.

20 THE COURT. So far it is excluded because
I have not seen any purpose it would serve
by its introduction. Of course, if you are try-
ing to show by the photograph that this is
the man alleged in the indictment to be killed,
it can be shown later, but I cannot see quite
yet how it is connected up. Now, you may
find that the photograph does show that the
man examined at the morgue was the same
man alleged in the indictment to be killed and
it may be material at that time, but I cannot
admit it now.

Q Where did you see your step-father on or
after March 10, 1928?

A I saw him Sunday morning about 11 o'clock
at Holle's morgue.

30 Q And you say that your step-father at Holle's
morgue is the one that is pictured in this picture?

A Yes. I seen him the same as in that pic-
ture.

Q Do you know where your step-father was on
the 10th day of March, 1928?

A No, I do not. I found out through the paper
what had happened and that is how I come to
go to Holle's morgue.

(Photograph marked S-8 for identification.)

40 CROSS EXAMINATION waived.

State's Witness, Joseph Cocozza, Direct

JOSEPH COCOZZÁ sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

Q You are a county detective connected with the Homicide Squad?

A I am.

Q And in your capacity as a member of the homicide squad of Essex County did you go to the premises 72 Hayes street?

A I did.

Q When?

A March 10. It was Saturday night I got there, about half-past eleven.

Q And with whom?

A I went with our chauffeur.

Q And did you go into the rear building of premises 72 Hayes street?

A I did.

Q And did you go into the premises on the first floor of that rear building known as the Caputo and Treficanto apartments?

A I did.

Q How long were you in those rooms?

A Why, in those rooms until about half-past two in the morning.

Q And did you look about those rooms?

A I did.

Q And did you make a general investigation and inspection of the premises?

A With Detective Harris and McConnell we made a general inspection of both apartments.

Q Now, I show you Exhibit—

THE COURT. What time did you get there?

WITNESS. About half-past eleven, at night.

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State's Witness, Joseph Coccozza, Direct

Q Do you know what time the murder was committed?

MR. WACHENFELD. I object.

MR. SIMANDL. Of his own knowledge.

10 Q From his investigation.

THE COURT. Sustained.

Q Now, I ask you, Mr. Coccozza, if Exhibit S-2 depicts the condition of the apartment on the right-hand side as it existed that day you saw it.

THE COURT. When you got there.

Q When you got there?

20 A Yes, that is the way the chairs and the furniture was laid out on the night I got there, Saturday night.

Q I ask you if Exhibit S-3 purporting to be the bedroom of Treficanto on the righthand side is in the same condition as you saw it when you got there.

A Yes, the bed and the other things in the same condition.

Q And I ask you the same question with reference to Exhibit S-4 as to what that depicts.

30 A Yes, the conditions are the same. I think there was a little more snow. It snowed during the night and there was a little more snow on the ground.

Q But as to the physical construction of the building itself?

A The same.

Q And as to Exhibit S-5, purporting to be the kitchen of Caputo?

A The conditions are the same in that photograph.

40 Q And Exhibit S-6?

State's Witness, Joseph Coccozza, Direct

A Conditions are the same in that photograph as they were the night I was there.

Q And the same as to Exhibit S-7?

A Yes, conditions are the same in that photograph.

Q Now, when you reached the premises at 11 o'clock—

10

A About 11:30.

Q Who were in Caputo's apartment and who, if anyone, were in Treficanto's apartment?

A Detective Harris and McConnell were there when I went there. There was an officer from the Fourth Precinct there.

Q And outside of the officials of Newark and Essex County that you have mentioned, was there anybody else there?

20

A No.

Q Were any of the men or women or the body there?

A No. They were all removed when I got there.

CROSS EXAMINATION waived.

MR. BOZZA. I will reserve the right to call him for other evidence later on.

JOSEPH HARRIS sworn in behalf of the State.

30

DIRECT EXAMINATION by Mr. Bozza.

Q You are a member of the Newark Police Department connected with Police Headquarters?

A Yes.

Q Did you go to the premises 72 Hayes street?

A I did.

Q And when?

A March 10, about 10:30 P. M.

Q March 10, about 10:30 p. m., and when you

40

State's Witness, Joseph Harris, Direct

got to the premises 72 Hayes street, did you go to the rear building?

A I did.

Q Through the alleyway and into the rear building?

A I did.

10 Q Did you go into Caputo's and Treficanto's apartment?

A I did.

Q Did you look at the physical features of those two apartments, the furniture and so forth?

A I did.

Q And when you got there, who was there, if anyone?

A Sergeant Pframmer and another officer— I cannot recall his name.

20 Q And officer England?

A Yes.

Q And besides those officers were there anybody else there?

A Caputo was there. I know Caputo was being taken out as we went it. Mary Brennan and Mary Smith.

Q And were you present when these defendants were slated?

A No, sir.

30 Q Did you go to the station house, the Fourth Precinct, when Caputo was slated?

A After he was slated, I was there.

Q Did you personally read the book which fixed the time when this thing occurred?

MR. SIMANDL. I object.

THE COURT. Sustained.

Q Who took out Caputo?

A Sergeant Pfrommer.

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State's Witness, Joseph Harris, Direct

Q And did you remain on the premises?

A I did.

Q And how long did you stay on the premises?

A Well, approximately half an hour or more.

Q Were you there when Mr. Cocozza came?

A I was.

Q And then did you turn the premises over to
Mr. Cocozza? 10

A I did.

Q Where did you go after you left 72 Hayes
street?

A I went to the Fourth Precinct.

Q Now, while you made an examination of the
premises of Treficanto and Caputo, did you find
anything?

A Yes.

Q What did you find? 20

A I found two revolvers.

Q Anything else?

A No, sir.

Q Eh?

A No, sir.

MR. SIMANDL. Well, now, which is which?

MR. BOZZA. I was merely confining myself
to the physical features of the premises and
we called this witness for other features, if
necessary. 30

MR. WACHENFELD. I ask that that last
be stricken out.

THE COURT. Yes, strike it out.

MR. BOZZA. I will withdraw that.

Q Did you go together with Mr. McConnell or
find him there?

A Mr. McConnell and I went together.

CROSS EXAMINATION waived. 40

State's Witness, Alfred H. Pfrommer, Direct

ALFRED H. PFROMMER sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

10 Q You are a member of the Newark Police Department?

A Yes.

Q And sergeant of police connected with Police Headquarters?

A No, Fourth Precinct.

Q Did you on the evening of March 10, 1928, go to premises 72 Hayes street?

A Yes.

Q Under what circumstances?

A The orders of the desk lieutenant.

20 Q What did the desk lieutenant do?

MR. SIMANDL. I object to that.

THE COURT. Sustained.

Q And what time did you get to the premises?

A About 10:30.

Q And when you got there, what did you find?

A I found two officers and two women and Caputo in Caputo's apartment.

30 Q And who took Caputo into custody, if any one?

A The two officers that were there gave him to me and I took him to the precinct.

Q Was he slated?

A Yes, Caputo was slated.

Q Did Caputo give the time this murder occurred?

MR. SIMANDL. I object.

40 THE COURT. Sustained. That is a leading question.

State's Witness, Alfred H. Pfrommer, Direct

Q Was the body of the deceased in the apartment when you got there?

A Yes.

Q And what officers did you find there, officer Feiner, and Higgins?

A No.

Q Who?

A England and Brinkman.

Q Now, was any time given by anyone, if you know, as to when this thing occurred, either at the premises or in the precinct?

MR. WACHENFELD. I object.

THE COURT. Sustained.

CROSS EXAMINATION waived.

JOHN BRINKMAN sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

Q You are a member of the Newark Police Department?

A Yes.

Q And connected with headquarters or a precinct?

A Fourth Precinct.

Q Did you go to the premises 72 Hayes street on the evening of March 10, 1928?

A Yes.

Q When you got there, who did you find?

A When I got there there was two women, one man and the dead body and Officer England.

Q Which one man was there?

A The fellow over there, Cadona, I guess is his name.

MR. SIMANDL. Mr. Caputo.

Q Well, the one nearest to me?

States' Witness, John Brinkman, Direct

A That man standing up.

Q Did you speak to him about what occurred there?

A Yes.

Q Did he speak to you?

10

A No.

Q He did not answer you?

A No.

THE COURT. What was the name of the other officers.

(Not answered.)

Q Do you know of your own knowledge what time this occurred?

A No.

20

THE COURT. What time did you arrive there?

WITNESS. 10:30.

CROSS EXAMINATION by Mr. Simandl.

Q Where was the dead man lying?

A I cannot see on here.

Q Where was he lying there, showing you Exhibit S-6?

30

A This picture was taken in the opposite way. I guess here it is. He was lying here. His head was in the bedroom, his legs was in the kitchen, and he was lying on the right side up against the ice box and the wall.

MR. BOZZA. I object to his using these photographs until I have an opportunity to offer them in evidence unqualifiably.

THE COURT. I will allow the photographs to be used.

40

State's Witness, John Brinkman, Cross

MR. BOZZA. Does he admit that that photograph depicts the arrangement of the room at the time the murder was committed.

THE COURT. He does not admit anything.

Q Referring to S-6, who placed the chair behind the door as shown on that picture? 10

A There was a chair there.

Q Are you sure there was a chair there when you got there?

A Yes.

Q Was there a man there ahead of you, before you got there?

A Officer England.

Q Do you know who placed it?

MR. BOZZA. I object. 20

Q These chairs shown on Exhibit S-5, what about those chairs?

MR. BOZZA. I object on the ground it is not proper cross examination. He said nothing about that picture on direct examination.

THE COURT. Didn't he testify that those things were just in that position?

MR. BOZZA. No, your Honor, only as to what time he got there and whom he saw there, and if at that time anything occurred. 30

THE COURT. I will sustain that.

ADJOURNED until tomorrow, Tuesday June 5, 1928, at 10 o'clock A. M.

States' Witness, John Brinkman, Direct

ESSEX COUNTY COURT OF OYER
AND TERMINER.

SECOND DAY

Tuesday, June 5, 1928

10

STATE OF NEW JERSEY vs. GERARDO TREFICANTO and JOSEPH CAPUTO	}	On Indictment No. 422 Apr. T. 1928 for Murder.
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Continued pursuant to adjournment.

Present, Counsel as before stated.

20

JOHN BRINKMAN recalled in behalf of the State.
DIRECT EXAMINATION by Mr. Bozza.

Q You told us yesterday what time you arrived at the premises 72 Hayes street, the scene of this murder, and what time was that?

A Well, not exactly—I said half past ten, but it was in between half past ten and 10:45.

30 Q Now, did you make an inspection of the premises occupied by Treficanto and the premises occupied by Caputo?

A Yes, sir.

Q I show you photographs that were taken of those premises and I ask you about Exhibit S-6 and if the picture features the premises in the same condition in which you found them.

A This one here I cannot recall.

Q I ask the same question relative to Exhibit S-7?

40

A Yes.

States' Witness, John Brinkman, Direct

Q That picture exactly features that portion of the premises in the same condition in which you found them when you went there?

A Yes.

Q I ask you the same question relative to Exhibit S-2?

A Yes.

10

Q And with reference to Exhibit S-5?

A Yes.

Q And with reference to Exhibit S-3?

A Yes.

Q And with reference to Exhibit S-4?

A Yes.

Q Now, you say you went into Caputo's apartment and you looked about the apartment?

A Yes.

Q I inform you that this is the bedroom of Caputo's apartment—

20

MR. SIMANDL. I object to that. Let the witness say. He was there.

THE COURT. Sustained.

Q Can you tell me, officer, if you know whose premises and what portion of the premises that picture photographs?

30

MR. SIMANDL. What number is that?

MR. BOZZA. That is Exhibit S-6.

MR. SIMANDL. He said he could not recall.

THE COURT. No, I do not think that is the one he could not recall.

MR. BOZZA. No, that is not the one, your Honor.

40

State's Witness, John Brinkman, Cross

A It is hard for me to tell because what I took notice of I cannot see in this room.

Q Now, then did you leave anyone in charge of the premises when you left?

A Yes.

10

Q Who?

A Officer Schalk.

Q Is Officer Schalk in court?

A No, sir; he is sick.

Q How long has he been sick?

A Since Saturday; last week Saturday, the day the officer was shot.

CROSS EXAMINATION by Mr. Simandl.

Q What time did you get there?

20

A Between the hour of 10:30 and 10:45.

Q When you got there the dead body was there already?

A Yes.

Q Who else was there when you got there?

A (Not answered.)

THE COURT. The body was still there?

WITNESS. Yes.

30

Q Who else was still there?

A Officer England and Officer Schalk.

Q These chairs were all grouped in the corner, were they not, by someone?

A They were not this way. One chair was over here against the stove. This one was here where the shoe is, and this one was over here. (indicating).

Q Then they are not the same as on that photograph?

A Outside of one.

40

Q Wait a minute. They were not the same as

State's Witness, John Brinkman, Cross

the way they were when you got there?

A No.

THE COURT. That is Exhibit what?

MR. BOZZA. Exhibit S-5.

Q And this chair was not in that position 10
either, was it?

A I do not recall that chair.

Q You do not recall it?

A I do not remember that chair.

Q So that that was not in that position?

A I do not remember.

MR. BOZZA. That is Exhibit S-7.

THE COURT. Is there any evidence as to
what time the killing occurred? 20

MR. BOZZA. Not yet. I expect to prove
that shortly.

MR. SIMANDL. I am going to object to
any other crime than the one that occurred at
10:45.

MR. BOZZA. Well, do you stipulate that
this crime occurred at 10:45?

MR. SIMANDL. I do not stipulate anything.
I object to any crime other than the one that
occurred at 10:45 30

THE COURT. Now, you said you were go-
ing to prove the time.

MR. BOZZA. Yes, your Honor, as closely
as I possibly can.

Counsel for defendant Caputo prays an ex-
ception to the proof of any crime other
than the crime which occurred at 10:45. 40

State's Witness, Joseph Coccozza, Direct

THE COURT. Well, there is no proof so far.

JOSEPH COCOZZA recalled in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

10 Q Mr. Coccozza, who was left in charge of the premises after you completed your investigation?

A Officer Schalk from the Fourth Precinct.

Q Where is Officer Schalk?

A He is sick at home.

Q Did you try to subpoena him to bring him to court?

A Yes, I tried to subpoena him yesterday, but he was not able to appear, so I sent a car after him this morning, and if he feels any better he can come down this morning.

20 LOUISE WALDRON sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

Q Mrs. Waldron, on March 10, were you in the afternoon and evening thereof at premises 72 Hayes street?

A Yes.

Q Did you see this shooting?

A Yes.

30 Q What time did it happen?

A Well, I could not really tell you, toward evening.

Q What time was it when you first went into Caputo's apartment?

A Half past one or two o'clock.

Q In the afternoon?

A Yes.

Q And were you awake all through this time or asleep?

40 A No, I was asleep.

State's Witness, Louise Waldron, Direct

Q And when you awakened, was it light or dark?

A I think it was dark.

Q Was a lamp or any other lighting effect in the Caputo house when you awoke?

10

A I really could not tell you; I think there was.

Q What time do you think, as accurately as you can tell us, that this shooting occurred?

A I could not tell you.

Q Was it midnight or before midnight?

A Before midnight.

Q Did you see the officers come to the premises?

20

A No.

Q Did you not see any of the police officers?

A No.

Q How long before midnight was it?

A I can't tell you.

Q Do you know it was before midnight?

A Yes.

Q How do you know that?

A It must have been before midnight, because I was sleeping, I was sleeping in the bed and heard some loud talking—

30

Q I don't want to know the facts now, you will be called for that later on. Please tell me now what time it happened, to the best of your knowledge?

A About eight o'clock.

Q You think it happened about eight o'clock?

A Yes.

CROSS EXAMINATION waived.

40

State's Witness, John England, Direct

JOHN ENGLAND sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

Q You are a member of the Newark Police Department?

10 A Yes, sir.

Q Connected with the Fourth Precinct?

A Yes, sir.

Q On the night of March 10, 1928, did you go to the premises 72 Hayes street?

A Yes, sir.

Q What time?

A At 10:50 I was in the house.

Q You were in the house at 10:50?

A Yes, sir.

20 Q And when you got there, what did you see and what did you do and what did you hear?

A I knocked at the door and that man there, the one furthest left, opened the door and on the floor lad a man shot. He said the man was shot in that house. I asked him who he was, and he said he didn't know, and there was a lady sitting there, Laura Miller, and she said—

MR. WACHENFELD. I object.

30 Q Under what circumstances did you go to the premises?

A On notice from a young man by the name of Burke, he summoned Officer Jaeger and myself on Springfield Avenue, he said there was a shooting match—

MR. SIMANDL. I object—

Q But as a result of this man saying something to you you went to the premises?

A Yes, sir.

40 THE COURT. The man who opened the

State's Witness, John England, Direct

door, that is the man sitting right over there—

MR. SIMANDL. Stand up, Caputo.

(Defendant Caputo arises).

THE COURT. That is Caputo?

MR. SIMANDL. Yes, sir.

10

THE COURT. And what was it Caputo said?

WITNESS. He didn't say anything. I knocked at the door and walked in and said, "what is the trouble here?" He said, "This man is shot."

Q You were the first officer on the scene, as far as you know?

A Yes, sir, and Officer Jaeger, he was behind me, two steps.

20

Q What time were you informed of this, if you know?

A About five minutes previous to being in the house, three minutes previous, that would be a quarter to eleven.

Q A quarter to eleven you were informed?

A Of the trouble at 72 Hayes street, yes, sir.

Q Do you know who this man was who told you of these facts which caused you to go to the house?

30

A Why, I cannot recognize him now, but his name is Burke, that's all, he said, I don't know, I have his name and address.

Q Have you his name and address?

A Yes, sir.

Q What is his address?

A One is Anthony VanTango, 291 Littleton avenue and one is Sally Burke, 20 Bedford street.

Q How far were you away from 72 Hayes

40

State's Witness, William A. Jaeger, Direct

street when you were informed at 10:45 o'clock?

A One block.

CROSS EXAMINATION by Mr. Simandl.

Q And he said this man was shot?

10

A Yes, sir.

WILLIAM A. JAEGER sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

Q You are a member of the police department connected with the 4th precinct?

A I am.

Q And on the night of March 10, 1928, did you go to the premises 72 Hayes street?

20

A I did.

Q Under what circumstances did you go, what did you see and what did you do when you got there?

A I was notified by a person by the name of Sally Burke of a shooting match—

THE COURT. What was the name?

WITNESS. Sally Burke, I was notified by Sally Burke—

30

THE COURT. That is a woman, is it?

WITNESS. No, sir; that is a young man.

Q And where were you notified?

A I was standing at Boyd street and Springfield avenue.

Q And what did you do after you received that notification?

A Officer England and myself went over there.

Q And how far were you away from 72 Hayes street when you were notified?

40

State's Witness, Dr. Harrison S. Martland, Direct

A One block.

Q What time was it when you were notified?

A About 10:45.

Q Did you make an inspection of the premises?

A Not a very good one.

CROSS EXAMINATION waived.

10

DR. HARRISON S. MARTLAND sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

Q Dr. Martland, you are the Chief Medical Examiner of Essex County?

A I am.

Q And in your official capacity did you perform an autopsy upon one Anthony Tamburo?

20

A I did.

Q And before you performed the autopsy, was the deceased identified for you?

A The body was.

Q By whom?

A By one of the assistant medical examiners, Dr. Carmine Berardinelli, who saw the body at the seat of the crime on the evening before.

Q I show you Exhibit S-8, marked for identification, and ask you if that is a picture of the man that you performed the autopsy upon.

30

A It is.

Q Now, what did this autopsy consist of, doctor, and what did you find?

A My autopsy consisted of a complete examination of the body of the deceased. The body was that of an Italian man about 40 years of age, five feet 7 in height, about 155 pounds in weight, black hair and brown eyes. The body showed on the front, the autopsy was done eleven hours after

40

State's Witness, Dr. Harrison S. Martland, Direct

death—the body showed on the front entrance of three bullets, three bullet wounds situated in the following positions:

- 10 The first wound was situated on the right side one and a half inches below the right nipple. The wound on the skin here consisted of a reddish bruise one half inch in diameter, in the center of which was a hole one quarter inch in diameter. The edges of this hole were blackened. Situated to the right of this wound was a faint bluish bruising of the skin for a distance of about two inches, going to the right. There were no powder marks on the skin. There was no evidence of burning other than the blackened edges of the hole. This wound, on autopsy, was found to go
- 20 directly backwards, almost horizontally slightly downwards and slightly to the left, passing through the sixth rib, producing a fracture of the rib at this point; passing then into the right pleural cavity, the right chest, injuring the lower lobe of the right lung. It then passed through the dome of the diaphragm as it comes up into the abdominal cavity below, as the diaphragm comes up quite high in that region. It passed into the abdominal cavity now, going backwards and passed through the upper surface of the right lobe of the liver,
- 30 producing a wound about two inches in anterior-posterior length. The bullet then came out of the liver and passed again into the diaphragm into the chest cavity going into the lower lobe of the right lung and passing out at the back about the tenth rib, between the tenth and the eleventh ribs, where the bullet was not found at autopsy, over the back, there was an incision over the 10th, 11th and 12th ribs, two and a half inches in vertical height, which was made after death; that was
- 40 found by me on autopsy the next morning, and I

State's Witness, Dr. Harrison S. Martland, Direct

was told—well, there was a two and a half inch incision made as the autopsy disclosed, after death, where I assume that the bullet had been extracted after death. This wound produced extensive bleeding into the right pleural cavity, there being over a quart of fluid in the right chest compressing the lung; also from the wound in the liver, producing an extensive hemorrhage into the abdominal cavity, so that the pelvic cavity and both abdominal gutters in the abdomen were filled with fluid and clotted blood. The next wound was a wound on the left side in front just below the free lower border of the ribs, situated also under the left nipple line, about here (indicating). This wound was a much smaller wound than the wound on the right. The diameter of the hole here being about one-eighth inch, instead of one-quarter inch. It was surrounded by a small bruised area, but there were no powder burns and no brands. This wound, on autopsy, passed directly backwards, almost horizontal and slightly to the left for a distance of about seven and a half inches, where it was found in the muscles of the back, just in back of the left kidney. It had passed through the small intestine, producing small holes, with leakage into the periosteum cavity, and it passed through the left kidney. A 22-calibre lead bullet was found back in the muscles from this wound. There was a wound, a third wound, situated just above the pelvic bone here, an inch and a half to the left of the mid line and about a half inch above the bone was another bruise on the skin about three-eighths of an inch in size, containing in the center a guttered wound, as this bullet had tilted when it went in and lacerated the skin. This bullet passed downward to the right for a distance of about two inches,

10

20

30

40

State's Witness, Dr. Harrison S. Martland, Direct

where it was found in the thigh just externally to the femoral artery, and the vein. This wound produced hemorrhages in the surrounding muscle tissues, but did not actually go into the abdominal cavity.

10 THE COURT. You say that bullet was found?

WITNESS. Yes, at a distance of two inches. Another 22-calibre lead bullet was found imbedded in the muscles, so we have two bullets, both 22 calibre size, that I found in the autopsy.

THE COURT. Both lead?

20 WITNESS. Both lead. The rest of the autopsy showed no chronic or acute disease. There was a brush abrasion over the right forehead about an inch and a half in size and a small laceration over the top of the right ear. Outside of that there were no other bruises on the body.

THE COURT. I did not get that.

30 WITNESS. On the right forehead a brush abrasion a reddish scraping of the skin about an inch and a half in size and a small superficial laceration over the top of the right ear. The stomach was practically empty. It contained no gross food products. It had a slightly sour odor and the mucousmembrane was free. The other organs showed no evidence of chronic or acute disease.

Q Now, I show you an envelope which contains a small bullet and ask you if you saw that bullet before?

40

State's Witness, Dr. Harrison S. Martland, Direct

A Yes.

Q Where?

A I removed that bullet from this body, and that was the bullet which was taken from the wound on the left side, which was found in back of the left kidney.

10

Q And I show you another envelope containing another small bullet and ask you if you saw that before?

A Yes. That was the bullet that was removed from the wound in the thigh.

(Two bullets offered in evidence and marked respectively Exhibits S-9 and S-10).

Q Now, doctor, in your judgment and opinion, what was the cause of death?

20

A The cause of death was a bullet wound producing extensive hemorrhage into the pleural and abdominal cavities, with a combination of shock. The main amount of hemorrhage was due to the wound described in the right chest and produced by a larger bullet, I assume, than the two other bullets found.

Q Now, you have testified, doctor, that there was an absence of powder marks in and about the vicinity of the wound you have described?

A Yes.

30

Q Will you please tell the court and jury what, in your expert judgment, that indicates?

A Well, if the body was clothed, it might not indicate much. I should think it would indicate that they were not fired at extremely close range, although the clothing which I examined from the wound on the left side had a distinct smell of powder. That wound on the left side, in my opinion, was probably fired at a shorter range than the other two wounds, but none of the three were fired

40

State's Witness, Dr. Harrison S. Martland, Cross

at an extremely short range, as far as I can judge from the body.

CROSS EXAMINATION by Mr. Wachenfeld.

10 Q You said with reference to wound number one, the first wound, that there were blackened edges?

A Yes.

Q What did you mean by that?

A By almost any bullet wound the edges of the skin are blackened. That is due to two things, as a bullet enters the skin and strikes the soft, elastic skin, it pushes it in like a funnel so the edges of that funnel, the inside of that funnel are blackened by the lead of that bullet, from lead
20 alone. That is one thing, and also from the bruising, the impact.

Q Now, on these two bullet wounds on the body you saw no powder marks on the body?

A No.

Q Well, which of these three caused death?

A That is a little more difficult to answer. We can answer it in this way. The wound described in the groin, which went not into the abdominal cavity, but down into the thigh muscles.

30 Q That is the one you described as wound number three?

A Number three did not produce death.

Q So that we have number three—we can eliminate wound number three as the cause of death?

A Yes. Such a wound could have produced death from infection, but in this case he did not die from infection.

40 Q So we can eliminate entirely, so far as you are concerned, wound number three?

State's Witness, Dr. Harrison S. Martland, Cross

A Yes.

Q Now, which of the wounds number one and two caused death?

A (Not answered.)

THE COURT. Why don't you designate them as 22 and 32 calibre? 10

Q Which of the two wounds, the 22 or the 32 calibre, caused the death of this man?

A In my opinion the bleeding from the 32 calibre wound was more likely to have caused death in this case. On the other hand, the wound by the 22 calibre, which penetrated the small intestine and also produced considerable bleeding, could also have caused death.

Q Just a minute. I am not asking you what might have caused death, I am asking you in your opinion in this case which of the two wounds, in other words, the 32 or the 22 calibre wounds, caused the death of this person, in your opinion? 20

A In my opinion, it is a combination of the two wounds that caused death.

Q All right. Then, in your opinion, the 32 calibre wound without the 22 contributing wound would have caused death?

A Oh, yes. My opinion was in this case it was a combination of the two wounds, but I would firmly favor the 32 as being the most severe. 30

THE COURT. Would either one have been sufficient?

WITNESS. Either one would have been sufficient. The 22 calibre could have caused death by hemorrhage and shock as in this case.

Q I do not want to interrupt the doctor and 40

State's Witness, Dr. Harrison S. Martland, Cross

I do not want to interrupt the court, but the question is what did it cause.

THE COURT. Well, I asked him if either one would have been sufficient.

10 MR. WACHENFELD. I say that is immaterial. In other words, pneumonia would have been sufficient.

THE COURT. But he did not have pneumonia, but he did have these two shots.

Q Doctor, could you say, in your opinion, both of these bullets caused the death?

A I have stated specifically that the cause of death was hemorrhage and shock and that both of these wounds produced hemorrhage and that
20 both of these wounds could have produced shock, and either one could have produced shocks or hemorrhage alone, or they could have acted jointly and no one under the blue heavens can tell you more than that.

Q That is what I am driving at; in other words, you cannot tell us definitely which of the two wounds caused death?

A No.

Q And you do not think anybody else could?

30 A No.

REDIRECT EXAMINATION by Mr. Bozza.

Q Will you please tell us what this mark from the neck down to this middle of the pelvis is?

A That is the incision sewed up after the autopsy.

Q And was that done by you?

A No, not the sewing up, but the cutting.

40 Q The incision?

State's Witness, Dr. Harrison S. Martland, Re-direct

A Yes.

Q And will you indicate on that photograph the three bullet holes you mentioned, if you see them there?

MR. WACHENFELD. That picture is not in evidence.

10

MR. BOZZA. I offer it in evidence.

MR. WACHENFELD. I object to it.

THE COURT. For what purpose?

MR. BOZZA. I offer it in evidence for the purpose of showing more specifically, more accurately, the location of the three wounds explained by Dr. Martland and to show the man, his age—

20

THE COURT. I have not allowed you to show the age.

MR. BOZZA. To show that that was the man that was killed in Caputo's apartment.

THE COURT. For the purpose of identifying the deceased as the man who was shot?

MR. WACHENFELD. There is no dispute about it. The purpose of this picture is a picture of the dead man taken stark naked after the autopsy performed by Dr. Martland and it shows how the man was ripped open as every man is ripped open after an autopsy. I still object to it and I say the method of the prosecutor is unfair, and I say no doctor could have given a more accurate and definite description of the wounds themselves.

30

THE COURT. Let me ask this. Is it admitted by counsel for both defendants that

40

State's Witness, Thomas O'Mara, Direct

the man examined by Dr. Martland is the man who was shot at this address mentioned in the indictment?

MR. SIMANDL. The deceased, yes, sir.

10 THE COURT. I do not see any object in using the photograph.

MR. BOZZA. All right. I will withdraw the photograph.

THOMAS O'MARA sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

Q What is your business?

A Funeral director.

20 Q And where is your place of business located?
A 120 Brandford place.

Q Were you on the night of March 10 at 72 Hayes street?

A Yes.

Q And for what purpose?

A I was called by the assistant chief medical examiner, Dr. Berardinelli, to remove a dead body.

Q And did you remove the dead body?

A Yes.

Q Well, where did you bring it?

30 A To Holle's Morgue, 120 Brandford place.

Q Were you present when Dr. Berardinelli examined the body of the deceased?

A Yes.

Q What did he do in the examination of the body of the deceased?

40 A Well, he made a sort of a superficial examination in my presence and I removed some clothing for the doctor. It seems there was a supposed bullet in the back and the doctor took a knife and removed the bullet.

State's Witness, Thomas O'Mara, Direct

Q Now, I show you a bullet and ask you if you saw that bullet before?

A Well, I could not say that I saw this particular bullet. It was a 32 bullet, but the doctor took it and handed it, I believe, to Detective Harris.

Q I mean, were some of the police officers there at the time?

10

A Ys.

Q And was it marked for identification?

A Yes.

Q Will you please look at the bullet and see if that is the bullet that was marked in the officers' presence.

A Yes. The mark I see now; it was marked with a file cut on the top. That indicates it was the bullet I saw.

Q And the bullet was given to Detective Harris?

20

A Yes.

(Bullet marked S-11 for identification.)

JOSEPH HARRIS recalled in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

Q Were you present when Dr. Berardinelli extracted the bullet from the back of the deceased?

30

A I was.

Q And was Mr. O'Mara there?

A He was.

Q Were you given a bullet by Dr. Berardinelli?

A I was.

Q I show you Exhibit S-11 marked for identification and ask you if that is a bullet that was turned over to you and by whom?

A That was the bullet that was turned over to me by Mr. O'Mara.

40

State's Witness, Joseph Harris, Direct

A And of what calibre is that bullet?

A 32.

(Bullet offered in evidence and marked Exhibit S-11.)

10

CROSS EXAMINATION waived.

MR. BOZZA. I ask counsel if Dr. Berardinelli were here if he would testify that he extracted the bullet from the deceased.

MR. WACHENFELD. It is perfectly agreeable to me.

THE COURT. To the same effect as if he appeared and so testified.

20 LAURA SMITH sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

Q Miss Smith, where do you live?

A 685 East 140 street, New York.

Q Were you in Newark, New Jersey, on March 10, 1928?

A Yes, I was.

Q Where?

30

A I was in 72 Hayes street.

Q Whom did you go to see at 72 Hayes street?

A Joe Caputo's house.

Q Did you know Joseph Caputo?

A Yes, sir.

Q How long had you known him?

A About three years.

Q And for what purpose did you go to 72 Hayes street to visit Joseph Caputo?

40 A To get some clothing that when I was working in Newark I had left in his care.

State's Witness, Laura Smith, Direct

Q And what did that clothing consist of?

A Some old fashioned clothing.

Q And what time did you reach the apartment of Joseph Caputo?

A I haven't the least idea.

Q Well, was it in the afternoon or the forenoon? 10

A I believe it was in the morning.

Q What time did you have breakfast that morning?

A I can't tell you.

Q What time did you get up?

A I don't know, I didn't keep no track of it.

Q Were you sober that morning?

A Yes, I think I was, as far as I know.

Q And what time did you take a train to come over to Newark? 20

A I came over on Friday to Newark.

Q And did you spend that night in Newark?

A Yes, sir.

Q What time did you get up in Newark, do you know?

A I came over in the afternoon.

Q Approximately what time was it in the afternoon?

A Oh, in the middle of the afternoon. 30

Q Had you had your lunch?

A Yes, in the restaurant in Newark.

Q You had your lunch in a restaurant in New York?

A No, In Newark.

Q And it was after you had your lunch that you went to Caputo's apartment?

A Yes, sir.

Q Will you say how long it was, fifteen minutes or an hour or a half an hour? 40

State's Witness, Laura Smith, Direct

A No, I think it was around six o'clock on Friday night.

Q Now, when you got to Caputo's apartment whom did you find there?

A I didn't find anybody there.

10 Q Did you get in?

A No, sir.

Q Did you wait around?

A I stood in the hallway and Jerry called me across the hall, he heard me knocking and he opened the door.

Q And who is Jerry?

A Gerard, I think it is Treficanto.

Q Gerardo is his name and you call him Jerry?

A Yes. I don't know his name.

20 Q Point him out in the courtroom if you see him here.

A Oh, yes, there (indicating the defendant Treficanto).

Q The man at the right or the left?

A The man toward my right.

Q With the brown overcoat?

A Yes, sir.

Q Now, he opened his door and let you in his apartment?

30 A No, I stayed at the threshold of the door and he said that Joe was not home yet.

Q And did you go into his room or did you go into the corridor?

A No, he stood at his door and I stood there and he remarked these words, "Here comes Joe now."

Q And did you see Joe after that?

A Yes, and then we entered Joe's apartment.

Q Who went into Joe's apartment?

A This man who got shot and I.

40

State's Witness, Laura Smith, Direct

Q And this man who got shot did he come with Joe or alone?

A No, I was in that restaurant and the man who owns the restaurant said to me, "Do you know where Joe lives——"

MR. WACHENFELD. I object. 10

THE COURT. Don't tell us what he said.

Q You went to the resaurant?

A Yes, this man, I was reading a paper, a Newark paper, and I was sitting by the stove and in came the boss of the restaurant and said to me—

MR. SIMANDL. No, wait a minute, never mind what he said. After he conversed with you did you and he go out? 20

A The three of us went out.

Q Who, the proprietor, the deceased—

A The dead man and I went out from the restaurant.

Q Where did you go?

A Over to Joe's house, because we wanted to see Joe, and he said he was a personal friend of Joe's, but a stranger to me.

Q This man that left with you was the proprietor or the dead man? 30

A No, the dead man.

Q So that when Joe came to the house you and the dead man were at the house waiting for him?

A Yes, in the hallway.

Q And when Treficanto came out of his door and told you that Joe was coming the deceased was right there with you?

A No, I stayed there and went in Joe's apart- 40

State's Witness, Laura Smith, Direct

ment with this man and Joe—

Q Did anyone come in after, while you were there?

A Later in the evening, yes, sir.

10 Q How long were you in there before anybody came in?

A Well, I can't tell you that.

Q Fifteen minutes or an hour?

A Well, I can't tell, I can't say.

Q Well, was it still light or did it begin to get dark?

A It commenced to get dark.

Q And what were you and Caputo and Tam-
burro doing in the house?

A Nothing, me and him was talking, that was
all.

20 Q Who was Joe?

A Joe Caputo.

Q Is he in court?

A Yes, sir.

Q Where is he?

A Sitting next to Jerry Treficanto.

Q In the blue suit?

A Yes, sir.

Q And who was he talking to?

30 A He was talking in Italian to this man that
got shot.

Q What were you doing?

A Nothing, just merely talking there and then
I spoke to Joe about taking the clothing.

Q Well, was anything cooked, did you have
anything to eat?

A I don't remember eating anything there
that night.

Q Why don't you remember, you were sober?

A Because I don't.

40 MR. WACHENFELD. Who said she was

State's Witness, Laura Smith, Direct

sober outside of the Prosecutor? I object to the Prosecutor inserting she was sober.

THE COURT. She said she thought she was sober.

Q Now, why don't you remember what happened there?

A Because it just slipped my memory. Nothing occurred that I should remember it.

Q Nothing occurred that you should remember it?

A Nothing that would drive it into my mind to remember.

Q Who came in while these two men were talking in Italian and you were sitting there?

A Louisa Waldron.

Q And did she come in alone or accompanied by anybody?

A I don't remember whether she had anybody with her, she came across the hall.

Q And what did she do?

A Well, just merely talked and Joe had told her that I could speak German—I didn't know the woman—and we were just talking about something, something in German, I was trying to speak something in German.

Q Then, while you and Louisa Waldron and Joe Caputo and Tamburro, the deceased, were in Caputo's house, did anybody else come in?

A Not that I know of, I didn't see anybody.

Q Not that you know of?

A No, sir.

Q What were you doing in this house all this time?

A Nothing, just merely sitting there with my things on.

Q Did anything happen in that house?

A Not, no, sir.

10

20

30

40

State's Witness, Laura Smith, Direct

Q What, no shooting took place in that house?

A Nothing at all.

Q Were you examined by the two lawyers here up in the jail?

A Yes, I was.

10 Q On the 29th of May, 1928?

A I don't remember the date, but I think it was last Tuesday. A week ago today, if I am not mistaken.

Q And did you say this to them, "Do you understand that I am talking about March 10th, the Saturday afternoon"?

A Oh, I thought you said on the 9th, I beg your pardon.

Q Well, did Louise Waldron come up to that house on that night?

20 A Yes, sir.

Q Didn't you tell me that you had come to Newark on a Friday night and slept in Newark and then went to Caputo's house the following afternoon? Saturday?

A Yes, I said in the morning, I didn't say in the afternoon, I said I was there in the morning.

Q Now, let us understand each other. On Saturday did you go to Caputo's house?

A Yes, I was there.

30 Q What time did you go?

A I don't know, early in the morning.

Q Did you come from New York?

A No, I came on a Friday night from New York.

Q Did you sleep in Caputo's house?

A No, I didn't do no sleeping, we were out until late and I went back there early in the morning.

Q What time that morning did you get there?

A I haven't the least idea.

40 Q Before dinner or before lunch?

State's Witness, Laura Smith, Direct

A Yes, it was, when Joe came they were starting to eat.

Q When you came to Caputo's house that Saturday morning who was there?

A I was there, we were there twice when we went back.

Q Who was there? 10

A The man that died and Joe and I.

Q And when you came there whom did you find in the place?

A We went there because we did not go back until late that night, it was away toward morning.

Q You had been out the night before, all three of you?

A Yes.

Q Then you came back to Caputo's house and stayed there? 20

A Yes, sir.

Q Now, on this Saturday morning did anybody join you?

A No, sir.

Q That Saturday afternoon did anybody join you?

A Yes, sir.

Q Who?

A Mary Brennan came.

Q Who else? 30

A And Louise Waldron.

Q Who came in first?

A Mary Brennan.

Q What were you doing before Mary Brennan came in?

A Sitting and looking at an old paper that I had.

Q What did you do after Mary Brennan came in?

A Well, Joe, a man started to fry some chops 40

State's Witness, Laura Smith, Direct

and Joe went for some wine.

Q Who fried the chops?

A The man that got shot.

Q The man that was killed?

A Yes, sir.

10 Q And Joe went for wine?

A Yes, sir.

Q That is the defendant Caputo?

A Yes, sir.

Q And did he come back with the wine?

A Yes, sir.

Q How much of it?

A Half of gallon.

Q In a glass jug that was transparent so that you could see the quantity of the wine or was it one of the other jugs?

20 A One of the other jugs, the man that died gave him the money to get it, a dollar and a half.

Q Who gave Joe the money?

A The man who was shot.

Q What did you do with that wine?

A Well, we sat down and made sandwiches and drank wine.

Q Did you drink anything else?

A Yes, sir.

Q What else?

30 A Whiskey.

Q Who had the whiskey?

A It belonged to Joe Caputo.

Q What did you eat?

A Veal and pork chops they were.

Q And as you were drinking and eating did anybody come in?

A Yes, sir, Louise came in.

Q Did she have anything to eat?

40 A Yes, I moved over and made her a sandwich and she sat down by me and ate it.

State's Witness, Laura Smith, Direct

Q Did she have anything to drink?

A Yes, Joe gave her a glass of wine.

Q Did she come in alone or accompanied by any one?

A She came in alone.

Q Did anybody come in later and ask for her?

10

A Jerry Treficanto.

Q And what did he say to her?

A He talked for awhile to Joe and this other man in Italian, just easy and went out and came back again and asked for Louise. Is she coming over and she called him Charlie and said, "All right, Charlie, in a little while", she did not come over and he came back angry with her coat and scarf and he threw it in her lap.

Q Did he do anything to her?

20

A No, sir.

Q He threw her scarf and coat in her lap?

A Yes, sir.

Q Did he leave the premises or did he stay in Caputo's house?

A No, sir, he went out.

Q Did he have anything to drink?

A No, Joe offered him a glass of wine but he said no.

Q Did he come back after he threw her coat and scarf into Louise Waldron's lap?

30

A I don't recall him coming back at all.

Q You don't recall him coming back at all?

A Not then.

Q Did he come back after that at any time?

A At the time of the shooting.

Q How long after that?

A To me it seemed a half or an hour.

Q Now, when he came back, what, if anything, did he do, what did he say and what did you hear?

A Well, Louise Waldron and I was lying on the

40

State's Witness, Laura Smith, Direct

bed in Joe's apartment in the bedroom, and I heard some loud talking and I went to see what it was and I rolled out of bed, and as I did I saw Jerry Treficanto standing in the doorway, and as I leaned up quick I saw him point a revolver at Joe Caputo.

Q In what hand did he have the revolver?

10 A In the right hand.

Q And when he came into Caputo's apartment with the revolver in his right hand where did he stand?

A Right at the threshold of the door.

Q And where was Joe Caputo when he came in with the revolver?

A Standing in the front part of the stove.

Q What did Joe Caputo do when Jerry Treficanto came in with the gun?

20 A He was standing there when Jerry fired quick and he ran to the bedroom and to the trunk and took a gun out.

Q How many shots did Treficanto fire?

A One then.

Q Where did he aim?

A Toward the stove, where Joe was standing.

Q And what did Joe do?

A He ran to the bedroom.

Q What did he do in the bedroom?

A Ran to the trunk and took his revolver out.

30 Q What did he do with the revolver?

A He goes back and stands at the door and fires to the place where Jerry was standing.

Q How many shots did he fire that way?

A One from the door.

Q Did he fire any other from any other part of the apartment?

A Yes, sir.

Q How many?

A One more that I saw.

40

State's Witness, Laura Smith, Direct

Q And he aimed it at whom?

A The doorway where Jerry was standing.

Q Was Jerry replying with any more shots?

A Yes, sir.

Q How many more?

A One that I know.

Q When Jerry fired the first shot at Caputo,
Caputo was at the stove?

10

A Yes, sir.

Q After Caputo went to get his gun from the trunk he stood at the door between the bedroom and kitchen and fired at Jerry?

A Yes, sir.

Q Now, when Jerry responded with another shot, as you testified, where was Caputo?

A Well, Joe jumped from the door into the corner and I could not see him, and Jerry fired from the door way into the corner.

20

Q Now, from what door and into what corner? I show you Exhibit S-1 which is a map of the premises. Now, this is Hayes street, this is the building facing the sidewalk, this is the alley leading into that house this is the hallway, this is Tamburro's apartment, this is Caputo's apartment, this is the door leading into the kitchen, that is the bedroom, show us, after Caputo fired at Jerry, where Jerry stood when he fired back at Caputo?

30

A Jerry stood here and Joe jumped into this place here, he jumped into that corner here, that is when Jerry fired the second shot that I saw (indicating).

Q Now, when Jerry came into the kitchen with his gun in his right hand Caputo was in front of this stove?

A Right in front.

Q Show us where?

40

State's Witness, Laura Smith, Direct

A Right across here (indicating).

Q And where was Tamburro at that time?

A Right here, sitting with his back toward the wall, right there (indicating).

Q And where was Tamburro at that time?

10 A Right here, sitting with his back toward the wall, right there (indicating).

Q Will you please indicate, I will indicate where you told me Caputo was.

A Right here, sitting with his back to the door when the first shot was fired (indicating).

Q Now, then, where was Jerry when he first came into the apartment and fired the first shot at Joe?

A Jerry was right here with the door not fully opened.

20 Q About there (indicating)?

A Yes, sir.

Q Well, I will mark a J there for Jerry.

A Yes, sir.

THE COURT. The door is not fully opened?

WITNESS. No, just like a person would push open the door.

30 MR. BOZZA. I better mark that a T for Treficanto.

Q Where was Caputo at that time?

A Right over here (indicating)?

Q When the first shot was fired?

A Yes, sir.

Q Then, you saw Caputo come across the kitchen into the bedroom to the trunk?

A Yes, sir.

Q Come back with a revolver?

40 A Yes, sir.

State's Witness, Laura Smith, Direct

Q And where did he stand when he fired at Jerry?

A Right there (indicating).

Q Now, then. Jerry fired at Caputo after Caputo fired at him?

A When Jerry fired he jumped into this corner.

10

THE COURT. Whom did you say?

WITNESS. Joe Caputo jumped from here into the corner and I did not see him then.

Q And he went into that corner?

A Yes, sir.

Q That is when Jerry fired the second shot at him?

A Yes, sir.

THE COURT. Where were you standing?

20

WITNESS. I was standing back here in the bedroom, because when Joe fired this shot he knocked me across the foot of the bed and I went here thinking Joe might fire again.

Q Louise Waldron was in back of you?

A Yes, sir.

Q Was she near the window and you were near the door?

A Yes, and when I heard the noise I rolled out quick and that is when I saw Jerry and when I got up I saw him standing there.

30

Q Now, then, when Caputo went to that corner where the closet is and after Treficanto had fired at him the second time, what did Caputo do, if anything?

A Well, I did not see him for a minute, the next I saw Joe he was back here again and I saw both, one firing from this side and one from that side.

40

State's Witness, Laura Smith, Direct

Q They fired some more shots at each other?

A Yes, sir.

Q But Treficanto never changed his position while he was in that kitchen?

10 MR. WACHENFELD. Don't lead her, please.
A He stood in the doorway.

Q Caputo came over here afterwards and then they fired at each other (indicating)?

A Yes, sir.

Q Now, how many shots did Caputo fire at Treficanto and how many shots did Treficanto fire at Caputo, if any, while they were in that position?

A I don't remember.

Q One or more than one?

20 A It seems to me like one.

Q It seems to you like one from each?

A Yes, sir.

Q And after they fired from that position as you indicated, what did Treficanto do?

A He disappeared from the door and turned this way from the yard.

Q Now, did you see him again after that?

A No, I did not.

Q Did you hear any more shots?

30 A Yes, sir, I did.

Q Do you know where the shots came from?

A They came through the window.

Q What window?

A The kitchen window over the table.

THE COURT. Where is that, which is the kitchen window over the table.

WITNESS. This is the table and here is the window.

State's Witness, Laura Smith, Direct

Q Now, how many shots came from there?

A Two.

Q Now, when two shots came from that window where was Tamburro?

A Well, I did not see him after, only when I saw the first shot fired.

Q Where was Caputo?

10

A Caputo, he is in the kitchen when the two shots came through the window.

Q What part of the kitchen?

A Right over here (indicating).

Q Where he was the last time after he had received the last shot from Treficanto?

MR. WACHENFELD. I don't think the Prosecutor ought to ask some questions and wind up with the word "received".

20

THE COURT. No, strike that part out.

Q Now, what did Caputo do after Treficanto went out and after you heard the two shots come through the window?

A He disappeared.

Q Do you know where he went?

A No, sir.

Q What did you do after the shooting was over?

30

A I went in and got this coat and put it on, a brown coat, and I put the other coat over my arm and then the officers came—

THE COURT. When you started to do that did you see the deadman?

WITNESS. Not until the officers came.

THE COURT. And when you saw him where was he?

40

State's Witness, Laura Smith, Direct

WITNESS. He was lying face down near the ice box.

THE COURT. Indicate that, please. About how many feet was that from the place where he was seated?

10 WITNESS. He was seated over here.

THE COURT. How many feet would that be from where he was seated?

WITNESS. I cannot tell you.

Q Just in this room.

WITNESS. Here is the entrance door and here is the ice box, and it was just a few steps.

Q You say his head was near the doorway and his feet there (indicating)?

A Yes.

20 Q And was it straight with the ice box?

A Straight.

Q I will indicate by putting an H there and F here, is that right?

A Yes.

Q That is when the officer came?

A Yes.

THE COURT. Then it was only a few seconds after the shots that the officer got there?

WITNESS. Yes, it was.

30 Q Now, during this time that Treficanto was firing at Caputo and that Caputo was firing at Treficanto, did you see Tamburro?

A Only that one time.

Q And when you saw him, who was he facing?

A Well, Joe was over about here and Mr. Jerry Treficanto was here, and the man was sitting here facing that way (indicating).

40 Q Now, then, going back a little bit to the time when Treficanto left and came back with the gun, did Mary Brennan leave Caputo's apartment and

State's Witness, Laura Smith, Cross

go into the apartment of Treficanto?

A Not that I know of, no sir. I could not say;
I do not know.

Q Could you recognize the gun?

A No, sir; I could not.

Q —that Treficanto had?

A No, sir.

10

Q That Caputo had?

A No, sir.

Q Did Tamburro have a gun?

A Not that I know of.

CROSS EXAMINATION by Mr. Simandl.

Q Miss Smith, I just want to clear up a few things in my mind. Where was Mary Brennan seated?

20

A At the end of the table.

Q Where? Just point, will you?

A Right here (indicating).

Q About there, eh?

A Yes.

Q Was there a chair there?

A Yes.

Q We will put Mary there. All right. Now, where were you—you were in the bed?

A Yes.

30

Q This bed is practically up against the doorway?

A Yes.

Q Then there is a passageway here?

A Yes.

Q You can see from in here right out into the hallway?

A Into the hallway.

Q You can see part of the hallway?

A Yes.

40

State's Witness, Laura Smith, Cross

Q Now, there is a sink there?

A Yes.

Q Close up against the stove?

A Yes.

10 Q And the stove does not allow very much room if there is a chair here to get in back of?

A Well, there is no chair near the sink and stove.

Q This is Exhibit S-5.

MR. BOZZA. Are those pictures in evidence?

THE COURT. They are not admitted now.

20 MR. BOZZA. I do not think that counsel can use the pictures unless they are admitted in evidence.

MR. SIMANDL. The possibility is they will be admitted in evidence by reason of counsel using it.

THE COURT. Well, why shouldn't he use them. He is in court in the presence of the Prosecutor.

MR. BOZZA. Because I think that none of the pictures—

30 THE COURT. Well, they may not be public property.

Q Well, Miss Smith, there is a chair, you say, at the end of the table?

A Yes.

Q And Mary Brennan was sitting on it?

A Yes.

Q Now, there is not very much room between the chair and the stove?

40 A No, there is not.

State's Witness, Laura Smith, Cross

Q Now, when you say that Caputo went over to the side you have indicated by the stove he had to run in back of Mary?

A Well, when the first shot was fired, she had been sitting on the chair, but she had gone out when the shooting was going on.

Q Well, was he standing in front of the stove? 10

A Yes.

Q Well, was it right where they open the doors?

A The front, yes.

Q Well, now, look at this again. This here is the toilet door?

A Yes, that is the toilet door.

Q Well, it is in the front.

A Well, I call that on the side; that is the front part of the stove, or the end of the stove, but I call that the front. 20

Q Now, Caputo was then standing there?

A Yes.

Q Nothing in his hand?

A Not that I saw anything in his hand.

Q Just standing there?

A Yes, talking to Mary Brennan and this man.

Q And then this man Jerry came in and stood in this doorway?

A Yes.

Q In Caputo's doorway? 30

A Yes.

Q And the first thing you saw him fire a shot at Caputo?

A Yes.

Q And then Caputo ran?

A Yes.

Q Into his room?

A Yes.

Q And got a gun out of the trunk?

A Yes. 40

State's Witness, Laura Smith, Cross

Q And the next thing he did was to stand in this doorway?

A Yes.

Q Is there a door here?

A No.

10 Q It is open there?

A Yes.

Q And he fired at Treficanto standing here in the doorway?

A That is where I saw Treficanto standing.

Q Was the gun in Treficanto's hand?

A I could not see.

Q Then where did Joe go?

A He jumped into the corner.

Q Then what happened?

20 A There was a shot fired by Jerry into the corner.

Q Then what did Caputo do?

A The next time I saw him, Jerry was standing over here (indicating).

Q Jerry was still here and he fired a shot at Caputo and Caputo fired back?

A Yes.

Q Then Treficanto goes away?

A Yes.

30 Q And the next thing you hear is three shots and you do not know who fired them?

A No.

Q Did Caputo always stay in the kitchen?

A In the kitchen.

CROSS EXAMINATION by Mr. Wachenfeld.

Q When did you first met this man Tamburro?

A I was in a restaurant in Newark.

Q What night of the week?

40 A On a Friday night.

State's Witness, Laura Smith, Cross

Q You met him on a Friday night?

A Yes.

Q Was that the first time you knew him?

A I never knew the man before.

Q How did you come to meet him?

A I was sitting in the restaurant reading a paper and the boss, an Italian man, he said did I see anything of Joe and I said, "No, why," and he just shrugged his shoulders and he goes out again.

10

MR. SIMANDL. I object to all conversations had between Treficanto and this witness not in the presence of Caputo.

THE COURT. Well, this is not Treficanto, this is the restaurant man in New York.

20

WITNESS. No, in Newark.

Q Well, at any rate, without going into details, you met Tamburro in a restaurant in Newark on Friday night?

A Yes.

Q Were you introduced to him?

A No.

Q Did he have a name, so far as you know?

A No, sir; I never knew the man from Adam.

Q Where did you go with him?

30

A The man in the restaurant asked me—

Q Where did you go with Tamburro?

A Over to Joe Caputo's.

Q Friday night?

A Friday night.

Q What time did you get to Caputo's?

A Around supper time.

Q What time of night was that?

A Around six o'clock.

Q How long did you stay there?

40

State's Witness, Laura Smith, Cross

- A Quite a while.
- Q What do you mean by quite a while?
- A Well, maybe an hour and a half or two hours.
- Q Up until what time?
- 10 A I could not tell you.
- Q Drunk or sober?
- A I had a couple of drinks of wine.
- Q Only a couple?
- A Yes.
- Q Would you say you were drunk?
- A No, sir; I was not drunk.
- Q You would say you were then sober?
- A Well, I was not sober if you had a couple of glasses of wine.
- Q You were inbetween?
- 20 A No.
- Q Well, where were you in reference to intoxication and sobriety?
- A Well, you would not call a person sober who had a few glasses of wine.
- Q Well, would you call yourself perfectly sober?
- A No.
- Q Well, it depends on what kind of wine or whiskey you had?
- A Most likely.
- 30 Q What time did you stay there that night?
- A I do not remember what time it was, but we went out.
- Q Twelve o'clock or one o'clock?
- A I have not the least idea. I did not time.
- Q Around two o'clock in the morning?
- A No, it was earlier than that.
- Q One o'clock?
- A Well, maybe it was round nine o'clock.
- Q Where did you go?
- 40 A Over to a restaurant.

State's Witness, Laura Smith, Cross

Q Back to the same restaurant?

A Yes.

THE COURT. This was Friday night?

WITNESS. Yes.

Q Was Tamburro still with you?

10

A Yes.

Q Was Joe Caputo with you?

A Yes.

Q How long did you stay at the restaurant?

A I do not know. They were over there talking, a friend of Joe's and him; they were talking in Italian and I was talking to one of the waitresses.

Q How long did you stay in the restaurant?

A I don't know.

20

Q And that is your only social activity while you were in the restaurant?

A Yes. I was talking to the girl in the restaurant.

Q I say that was your only social activity?

A Yes.

Q How long did you stay in the restaurant?

A I do not know. It was real late.

Q What do you mean?

A Well, early in the morning.

30

Q What do you mean by that?

A Well, maybe two o'clock.

Q So you stayed there from shortly after nine o'clock until two o'clock talking to the waitress in the restaurant and that was all you were doing?

A Yes.

Q And Tamburro and Caputo were with you?

A Yes.

Q Where did you go?

A We went out.

40

State's Witness, Laura Smith, Cross

- Q Where?
A Over to Joe Caputo's house.
Q You went back to Joe Caputo's house?
A Yes.
Q About two o'clock in the morning?
10 A Yes.
Q How long did you stay there then?
A I stayed there until the rest of the women
came in.
Q There was not any waitress for you to talk
to in Caputo's house at that time in the morning?
A No.
Q Who were you talking to?
A To Joe and the man who got shot.
Q Did the man who got shot talk English?
A Not very well.
20 Q Did he talk Italian?
A Yes.
Q Do you understand Italian?
A No.
Q Did you talk in Italian?
A No.
Q So you stayed there in Caputo's apartment
until the next afternoon when you met Mary
Brennan?
A Yes.
30 Q Did you sleep that night in Caputo's?
A I sat on a chair.
Q Where?
A In the kitchen.
Q And did the two gentlemen in the party go
to bed?
A I don't know whether they did or not.
Q Were you there?
A Yes.
Q There is no door in the doorway leading from
40 the so-called kitchen to the bedroom?

State's Witness, Laura Smith, Cross

A No, there is not.

Q Did you have any night clothes with you?

A I did not take my clothes off.

Q You kept your street clothes on and slept in a chair all night?

A Yes.

Q Did the men go to bed? 10

A I don't know. They may have laid down on the bed. Maybe they did.

Q What time did they get up in the morning?

A I don't know. I did not time them.

Q What time did you get up in the morning?

A I didn't have to get up. I was already up.

Q You didn't go to sleep at all?

A Well, I may have laid on my arm on the same chair.

Q Well, what time were you up and walking around? 20

A I was already up. I was sitting on the chair.

Q Well, when did you get up off the chair?

A I didn't time.

Q You could not tell us whether it was nine or ten o'clock?

A More than likely I got up more than once. I did not keep no track.

Q How many times did you get up and walk around? 30

A I didn't count them.

Q But you did get up and walk around?

A I don't know if I did or not.

Q You do not remember that?

A No.

Q Well, if you walked around, where did you walk to?

A Well, maybe to the bathroom and back.

Q Well, at any rate, did you go out of Caputo's 40

State's Witness, Laura Smith, Cross

house the next morning?

A No.

Q Stayed there that morning?

A Yes.

Q What did you do?

10 A Sitting there reading the paper.

Q Where did you get the paper?

A Well, when I come from New York on Friday morning, I bought it.

Q So you were reading Friday's paper Saturday morning?

A Yes, because there was no other one there.

Q Did it take you all the morning?

A Well, I suppose I was looking over it.

Q And was Tamburro in Caputo's house all that morning?

20 A Yes.

Q Was Joe Caputo there?

A I don't know whether he was there or gone out.

Q Who next came in Caputo's apartment?

A Mary Brennan.

Q How long had you known Joe Caputo before this thing happened?

A About three years.

30 Q Did you see him quite often during that time?

A No.

Q How often did you see him?

A Very seldom.

Q How long was it before that date?

MR. BOZZA. I think that is pretty far fetched.

40 THE COURT. Well, I will allow him to find out.

State's Witness, Laura Smith, Cross

Q How often did you see him during that time?

A Well, when I was working in Newark and he came into the restaurant, the man in the restaurant used to change Joe's checks.

Q Where did Caputo live before he lived at 72 Hayes street? 10

A On 15th avenue.

Q Did you visit him there?

A Once, when I took my clothes over.

Q Did you meet Mary Brennan there?

A Only once.

Q Well, the next person that came into Caputo's apartment on Saturday, March 10, was Mary Brennan?

A Yes.

Q What time did she come there? 20

A Around noon time, when we were going to eat.

Q By that you mean twelve or one o'clock?

A It may have been one.

Q And when Mary Brennan came there, did she eat with you?

A Yes.

Q So there was a foursome at the dinner or lunch, whatever you call it?

A Yes. 30

Q The defendant Treficanto was not there?

A No.

Q Well, during lunch did you have anything to drink?

A We had wine.

Q Anything else?

A Not then. When we were eating we were drinking wine. We had whiskey first.

Q Where did you get the whiskey?

A The man who got shot took it out of Joe's 40

State's Witness, Laura Smith, Cross

closet and give us a glass.

Q Did you only have one glass of whiskey?

A It was a large one.

Q Did you only have one glass of whiskey?

A As far as I know.

10 Q Do you know what time in the afternoon you had the glass of whiskey?

A It was just before we ate.

Q When you got through eating, what happened?

A They were talking and I went into the bedroom and I laid down on the side of the bed and Louise Waldron crawled in back of me.

Q What time did you go on the bed?

A Well, I didn't have any sleep the night before.

20 Q At that time were you drunk or sober?

A Well, I drank quite a little wine.

Q Were you drunk or sober?

A Well, I was not sober.

MR. BOZZA. I think it calls for a conclusion.

THE COURT. She has a right to say whether anybody is drunk or sober.

Q Would you say that time you were drunk or sober?

30 A Well, I was not sober.

Q Would you say you were drunk?

A Well, more than likely.

Q Now, had you been in that bedroom in Caputo's apartment before Mary Brennan got there?

A Yes, in the morning I was.

Q What doing?

A I was getting my old brown coat.

Q Hadn't you been in that bed sleeping?

40 A No.

State's Witness, Laura Smith, Cross

Q Isn't it a fact that when Mary Brennan came there you were in Joe Caputo's bed?

A I was not. I was in the kitchen when Mary Brennan came.

Q You are sure about that?

A Positive.

10

Q Now, when you decided to go to bed, were you put to bed by Joe Caputo?

A No; Joe took me by the arm and said, "Why don't you lie down," and I laid down.

Q And after Joe took you by the arm and led you to the bed, you went to sleep?

A No. Louise Waldron came in and laid down in back of me.

Q Was she drunk or sober?

A She was as drunk as I was.

20

Q And you and Louise went to sleep?

A Yes.

Q How long did you sleep?

A It seemed to me a half an hour.

Q Now, before you went into the bedroom to go to sleep, you saw Treficanto come into Caputo's apartment?

A Yes.

Q Did he talk English when he came in?

A No. He was talking to Joe in Italian.

30

Q Did you ever hear Jerry talk English?

A Not to my knowledge, because I didn't know the man.

Q You had never met him before?

A Not to my knowledge, no, sir.

Q Now, when he came in, Mary Brennan was there?

A Yes.

Q Was Louise Waldron there?

A Yes.

40

State's Witness, Laura Smith, Cross

Q Tamburro was there and Joe Caputo was there?

A Yes.

Q Well, when Jerry came in, he said something in Italian to whom?

10 A To Joe.

Q And did Joe answer him in Italian?

A Yes.

Q Was there a conversation?

A Yes, everything was in Italian, but in Italian it sounded as if they were fighting, if they were not.

Q Well, as far as you could see there was no fighting?

A No.

20 Q And then Jerry went out?

A Yes.

Q And Louise Waldron stayed there?

A Yes.

Q How long before Jerry came back?

A Well, he was not gone long. He went across the hall and came back.

Q How long would you say he was gone?

A I don't know.

Q About?

30 A Well, it was not long. He just merely went across the hall.

Q Well, fifteen or twenty minutes or an hour or two hours?

A Well, it was not that long. It was only a little while.

Q And then Jerry came back?

A Yes.

Q What did he do then?

A He had Louise's coat and scarf and threw them in her lap.

40 Q Did he say anything to her at that time?

State's Witness, Laura Smith, Cross

A No. It was before when he asked her if she was coming over.

Q In English?

A Yes.

Q She called him Jerry?

A Yes.

Q When Jerry came back he threw the scarf and hat on Louise's lap? 10

A No, the scarf and coat.

Q And did he say anything to Louise then?

A I don't know if he did or not.

Q Louise had been drinking whiskey by that time, had she not?

A Yes.

Q Isn't it a fact that Louise then told Jerry that he could go to hell?

A I didn't hear her say anything. 20

Q You did not hear her say anything?

A No, I didn't.

Q You are sure about that?

A I am positive.

Q Well, at any rate, did she say anything to Jerry like that?

A She might have said something. I did not hear her voice.

Q What did Jerry say after she spoke to him?

A He went across the hall. I do not know whether he went in his house or came out. 30

Q Well, did he come back again?

A I do not remember him coming back again, until he come back with the revolver.

Q You haven't any idea how long you were sleeping?

A It seemed short to me. It may have been a half hour.

Q Did you say this morning when you were first called that you thought this shooting took 40

State's Witness, Laura Smith, Cross

place about eight o'clock?

A I didn't.

Q What time did you say was the time of the shooting?

10 A I didn't mention anything about the shooting.

Q Well, what time did the shooting take place?

A It was dark.

Q What time did it take place?

A I don't know.

Q Six o'clock.

A No, it was later.

Q Seven?

A I couldn't say.

Q Eight?

20 A I couldn't say.

Q Nine?

A I couldn't say.

Q Ten?

A I don't know.

Q You cannot give us any idea whether it was seven or twelve o'clock?

A No, I couldn't.

Q Why not?

30 A Because I didn't look at any clock. I had been lying down and I did not know what time of the night it was.

Q What was the next thing you heard after you were sleeping?

A I heard some noise.

Q What kind of noise?

A It seemed to be a thumping like a bang on the door and loud talking.

Q Was it loud talking in Italian?

A Yes.

Q Could you tell who was talking?

40 A No, I couldn't, the both of them were talking.

State's Witness, Laura Smith, Cross

Q Could you tell from where you were at that time what was causing the thumping?

A No, I couldn't.

Q Did it sound like a man's head hitting the floor?

A Only it sounded like a knob rattling on the door. 10

Q You think you could distinguish between that noise and the—

A Oh, yes.

MR. SIMANDL. And the knob what?

WITNESS. Well, somebody trying to open the door in a hurry.

Q How long did that continue?

A Well, when I heard it and the loud talk and I went to see that and that is when I tumbled out of the bed. 20

Q Didn't it continue, as a matter of fact, for ten minutes?

A No, it didn't seem ten minutes to me.

Q Didn't you so testify on your examination?

A It was ten minutes?

Q Yes.

A Well, it did not seem any more than five minutes to me. 30

Q No, was it five minutes?

A Well, that is all it seemed to me.

Q Didn't you say on this examination that it was ten?

A Well, I do not remember whether it seemed ten to me.

Q Well, during the time you heard this thumping and the argument in Italian, you were in bed, weren't you?

A Yes. 40

State's Witness, Laura Smith, Cross

- Q Which way were you lying on the bed?
 A My head was toward this way (indicating).
 Q Your head was toward this partition?
 A No, this way. My feet was toward the trunk.
- 10 Q And where was Louise lying?
 A In back of me, over against the wall.
 Q And she was lying in the same relative position you were?
 A I do not know what position she was lying in. I was lying on my back.
 Q Was there any light in this room?
 A Only from the window.
 Q Which window?
 A Over that way (indicating).
 Q Well, this was at night?
 20 A Yes.
 Q Did any light come in?
 A I couldn't see any.
 Q So there was not any light in that room?
 A No.
 Q Then when you woke up did you say you rolled out of bed?
 A As I heard this noise I turned quickly and I was too near the edge of the bed, and I rolled out.
 Q Now, before you rolled out of bed, did you
 30 hear a shot fired?
 A No.
 Q Sure about that?
 A Positive.
 Q Where were you when you heard this shot?
 A I was standing up.
 Q Standing up where?
 A In the bedroom.
 Q Whereabouts in the bedroom?
 A I stood about here (indicating).
 40 MR. BOZZA. I ask that that be marked.

State's Witness, Laura Smith, Cross

Q Right there?

A Yes.

Q What do you want to mark it?

MR. BOZZA. S, Smith.

Q S. That is where you stood?

A Yes.

Q Now, up to the time you had gotten up, did
you hear a shot fired? 10

A Not until the time I got up, no, sir.

Q Sure about that?

A Positive.

Q When you got up, what did you see?

A I saw Jerry Treficanto. I looked quick and I saw Jerry Treficanto go like this to see who he was aiming at, and it was Joe.

Q You could see all that after the whiskey
and wine you had in you? 20

A Yes.

Q And after you had been sleeping?

A Yes.

Q And after you fell out of bed?

A Well, I didn't fall, just as you roll out.

Q Where was Jerry at the time?

A In the doorway, entering into the hall.

Q And was the door open or closed?

A It was not fully opened.

Q Well, was it just slightly ajar? 30

A No, that way (indicating).

Q Sure you could see all that?

A Yes.

Q How many lights were there in this so-called
kitchen?

A One.

Q Where was that?

A Standing on the table.

Q Standing on this table?

A Yes. 40

State's Witness, Laura Smith, Cross

Q Where was Joe at that time that Jerry was in the doorway?

A Standing over there (indicating); it is marked there.

10 Q It is marked here?

A No, over here (indicating).

Q Where was Tamburro?

A When I looked he was sitting on that chair marked S.

Q So that from this mark S you could see Tamburro?

A Yes, when I went to get up I saw the elbow of Tamburro.

Q As you went to get up from where?

A From the floor.

20 Q Oh, you were on the floor?

A Well, on my hands and knees, like getting up.

Q You did not hurt yourself when you fell, did you?

A No, I am glad I didn't.

Q So am I. And then a shot was fired?

A Yes.

Q Who fired that shot?

A Jerry Treficanto.

Q What did you do?

30 A I came back by the wall.

Q What did Joe do?

A He ran into the bedroom.

Q Did he run past you?

A Yes.

Q What did Tamburro do?

A I don't know.

Q Did you see him?

A Not then. I only saw him once.

Q What happened next?

40 A Joe took a gun out of the trunk.

State's Witness, Laura Smith, Cross

Q What did he do then?

A He went back to the bedroom doorway.

Q What did he do then?

A He made toward the door Jerry had been standing in.

Q What did he do then?

A Jumped from there into the hallway.

10

Q Did he fire when he got to the hall bedroom doorway?

A Yes.

Q How many times did he fire?

A Once.

Q Then where did he go?

A He jumped into the corner.

Q Which corner?

A It is marked.

Q This one marked B?

20

A No, in front of the closet.

Q You saw him jump into that corner?

A I saw him jump into that direction.

Q Did you see him jump in that corner?

A I didn't see him in the corner.

Q Did you see him there at that time?

A Not then, no, sir.

Q What happened to Jerry; what did he do?

A He fired the second shot from his gun, came from the doorway into the corner.

30

Q Could you tell which corner it was?

A Well, I was standing right there by that door.

Q Which corner did Jerry shoot into the second time?

A The second shot was in this corner.

Q In the closet?

A Yes.

Q Did you see in the corner?

A I didn't see Joe in the corner.

Q Did you see in the corner?

40

State's Witness, Laura Smith, Cross

A I didn't see.

Q What happened to Tamburro during all of this time?

A I don't know.

Q Did you see Tamburro again?

10

A No, sir; I didn't.

Q Isn't it a fact that Tamburro came into this bedroom?

A If he did, I didn't see him.

Q You do not remember anything that happened that night?

A I remember that part thoroughly.

Q Do you remember everything that happened very distinctly?

20

A I remember Joe running and bumping into me when he went around the foot of the bed and got the gun out and he backed to the doorway and fired.

Q How many shots did Joe Caputo fire altogether?

A Two what I saw.

Q How many did Jerry fire altogether?

A Three. Two that I saw.

Q Did you see the gun in Jerry's hand?

A I cannot describe the gun, but I know it was a large one.

30

Q You are sure of that, are you?

A It was a kind of an end sticking out past his hand.

Q You are sure it was a large gun?

A Well, it looked large to me.

Q In which hand did he have it in?

A In his right hand.

Q How many shots did he fire?

A Three that I saw.

Q Did he have another gun in his other hand?

40

A I didn't see him.

State's Witness, Laura Smith, Cross

Q Did you see him with more than one gun?

A No, sir.

Q Did the three shots that he fired, that you saw, come from the one gun?

A I cannot say, but I know he had it in his right hand. 10

Q Well, did you see him shoot from anything else other than the one gun that you saw him have in his right hand?

A No, sir.

Q How many shots did Caputo fire?

A Two that I saw.

Q How many shots did Tamburo fire?

A I didn't see him fire any.

Q Do you know whether he fired any? 20

A No, sir, I do not.

Q As far as you are concerned he might have fired?

A He might have, for all I know.

REDIRECT EXAMINATION by Mr. Bozza.

Q In firing three shots, are you counting also the two that you testified to from the outside window?

A No, sir, because I don't know who fired them. 30

Q So that all you know is that seven shots were fired together?

A As far as I know, yes, sir.

Q You say you don't know what time this occurred?

A No, I know it was dark.

Q Do you know it was dark?

A Yes, sir.

Q Did I understand you to say on direct examination, in answer to the Judge's question, that it 40

State's Witness, Laura Smith, Re-direct

happened a few minutes before the police arrived there?

A Yes, sir.

THE COURT. Caputo stood here in the doorway (indicating)?

10

WITNESS. No, Treficanto.

THE COURT. Stood there in the doorway, at the doorway and fired at Caputo over here.

WITNESS. Right where the mark is.

THE COURT. Then Caputo went in here to this room again, came back and went into this corner.

20

WITNESS. He fired from the doorway and went to the right. I saw him, but I don't know how he got over there, but I saw him there.

THE COURT. Then did he get back into that corner again

WITNESS. Yes.

30

THE COURT. Then he went back from there over here and fired again?

WITNESS. Yes, sir.

REDIRECT EXAMINATION By Mr. Bozza.

Q You didn't have a gun that night?

A No, sir.

Q And you did not do any firing?

40

A No, sir, I didn't.

State's Witness, Laura Smith, Re-cross

RE-CROSS EXAMINATION By Mr. Simandl.

Q Joe never left his room, did he?

A No sir.

RE-CROSS EXAMINATION By Mr. Wachenfeld.

Q Did you see anybody strike Jerry Treficanto there? 10

A No, sir.

Q Do you know whether or not he was struck?

A No, he was not struck.

Q How do you know?

A Well, when the shooting was going on he stood in the door. I first saw him, and he turned quick to go, there was no striking.

Q You were in bed, weren't you, asleep?

A Yes, sir. 20

Q And you were awakened, according to your testimony by a quarrel and a thumping.

A Yes, just by the sound of a door opening quick like, the shaking of the knob.

Q Did you see Jerry Treficanto struck by anybody?

A No, sir.

Q You didn't see him struck at any time?

A No, sir.

Q Did you see anybody shoot at him? 30

A I saw Joe.

Q Did you see Caputo shoot at him?

A No, sir, I did not.

Q Do you know whether he was wounded or not?

A No, sir, I do not.

Q He was not wounded, as far as you know?

A No, sir.

Q And Joe Caputo was not wounded, was he?

A No, sir. 40

State's Witness, Mary Brennan, Direct

REDIRECT EXAMINATION By Mr. Bozza.

Q Which way does that door open, towards the icebox or towards the table.

A It backs toward the table.

10 Q So that while you saw the door which was partly open there you did not see Jerry at that corner?

A Yes.

MARY BRENNAN sworn in behalf of State.

DIRECT EXAMINATION By Mr. Bozza.

Q Where do you live?

A 18 Prospect place.

Q Are you married or single?

20 A Married.

Q What is your age?

A Twenty-seven.

Q Where do you work?

A General housework.

Q Do you know Joseph Caputo?

A Yes, sir.

Q How long have you know him?

A Three years.

Q Do you know Jerry Treficanto?

30 A I only seen him once.

Q When was that?

A It was three weeks before the shooting.

Q Now, on March 10th, last past, did you go to the home of Joseph Caputo?

A Yes, sir.

Q Where did you start from?

A 359 Morris avenue.

Q What kind of a place is that?

A My sister's home.

40 Q What time did you leave your sister's home?

State's Witness, Mary Brennan, Direct

A Quarter after one.

Q Did you go directly to Joe Caputo's house?

A Yes, sir.

Q What time did you get to Joe Caputo's house?

A Around half-past one.

Q When you got there who was there?

10

A Laura Smith and the man who got shot. I don't know his first or his last name, and Joe Caputo.

Q How was that man dressed?

A The man was fully dressed, the man who got shot.

Q Now, was he doing anything when you came in there?

A No, he was sitting there.

Q And what was Laura Smith doing?

20

A Laura Smith was in bed.

Q And what was Joe Caputo doing?

A Joe was sitting in the kitchen.

Q How long did you stay?

A I stayed until after the shooting, until I got arrested.

Q Now, was there any cooking done there?

A Yes, sir.

Q Who was doing the cooking?

A The man that got shot done the cooking.

30

Q And was he doing that when you came in the door?

A No, sir, he did not start the cooking, I was there when he started the cooking.

Q Did anybody leave the apartment while this Tamburro was cooking?

A He sent Caputo for wine.

Q Did he come back with it?

A Yes, sir.

Q How much of it?

40

State's Witness, Mary Brennan, Direct

A I don't know how much, why, the man that got shot gave him a dollar and a half.

Q Now, while Tamburro was cooking and Caputo was out, what were you doing?

10 A I was sitting on the chair at the end of the table, and Laura Smith got up and got dressed, and she asked the man for a drink, and the man who got shot went to the kitchen closet and got out a half a jar of whiskey.

Q Did you do any drinking?

A Yes, sir.

Q And the whiskey was being drunk before Caputo came back with the wine?

A Yes, sir.

20 Q After Caputo came with the wine was the wine served?

A Yes, sir.

Q Was the meat served?

A Yes, sir.

Q And while you were drinking and eating the following were in the house, Caputo, you, Laura Smith and Tamburro.

A No, Tamburro was not there, the man who got shot was there.

Q The man who got shot, was he there while you were eating and drinking?

30 A Yes, sir.

Q See if I have it right. Caputo, was he there?

A Yes, sir.

Q And Laura Smith?

A Yes, sir.

Q And Tamburro?

A Yes, sir.

Q And yourself?

A Yes, sir.

40 Q Did anybody come in while you were eating and drinking?

State's Witness, Mary Brennan, Direct

A Louise Waldron.

Q Alone or accompanied?

A Alone.

Q Did you know Louise Waldron?

A No, sir, I never seen her before.

Q And yourself? 10

A Yes, sir.

Q Was that the first time you met her?

A That was the first time I met her.

Q When Louise Waldron came into the house what did she say?

A She was asked if she would have a sandwich with us and a glass of wine.

Q Did anybody come in after Louise Waldron came in?

A Yes, the man from across the way, they called him Jerry. 20

Q Is he in court?

A Yes, sir, he is right here, sitting up there.

Q The man with the brown overcoat?

A Yes, sir (indicating the defendant Treficanto)

Q What did he say when he came into the apartment?

A He wanted Louise Waldron out, he asked her out to his place.

Q What did Louise Waldron say? 30

A I can't say as to whether she said no or whether she would go.

Q Now, did Jerry Treficanto stay there, or did he leave?

A He stayed there a couple of minutes and he walked out and he was asked to have one of the sandwiches and a drink, but he refused, and then he went out.

Q Did he come back?

A He came back a short time afterwards. 40

State's Witness, Mary Brennan, Direct

Q How long after that did you see him come back?

A I think it was about twenty minutes.

Q And what did he do when he came back?

10 A He came back smoking and he put his back up against the door and asked Louise Waldron to come back again.

Q And what did Louise Waldron say in response to the second request to leave?

A I can't say as to what she said, if she would or she would not.

Q And did Jerry leave then or stay?

A He left and he came back with Louise's scarf and coat and threw it in her lap.

20 Q And when he threw Louise's scarf and hat and coat in her lap, did he say anything to her?

A No, sir.

Q Did he stay then or leave?

A No, he left right away and he said some words in Italian, but I could not understand.

Q And when he said those words in Italian, did he say them loudly or in a quiet tone?

A Loudly.

Q And did Joe Caputo reply to him?

A Yes.

Q And was Joe's reply quiet?

30 A Quiet.

Q And after he left did he come back?

A He went out and he went to lock his own door and he came back in about two and a half hours, as I think.

Q Did you go with him when he left?

A No, sir.

Q Didn't you go into his apartment?

A No, sir, I don't remember.

Q Did you go into his apartment?

40 A No, sir.

State's Witness, Mary Brennan, Direct

Q Didn't you and Treficanto have a little dispute in his apartment?

A Not that I remember.

Q Were you intoxicated?

A Well, I had some in me.

Q When Treficanto came back an hour or two hours later, as you say, what did he do? 10

A Well, he went into his own house and after while he came back to Joe's door and partly opened the door and raised his right hand to Joe and spoke to him in Italian and I heard a shot.

Q And when he raised his right hand and spoke to Joe in Italian, what did he have in his right hand?

A I couldn't say.

Q Did you hear shots?

A I heard shots and I saw the sparks. 20

Q Tell us, please, indicate on the map where you were when Jerry came to the door and where Caputo was. I will explain the map, this is Hayes street and this is the sidewalk and here is the alleyway, here is Treficanto's apartment, here is the corridor and here is Caputo's apartment. This is the door entrance and this is the door into Caputo's apartment—

A I cannot understand very much about a map.

Q To go to Caputo's house you come through this alley? 30

A Yes, sir.

Q And you walk up these stairs?

A No, sir.

Q You had to go up three steps?

A No, I don't have to go up no steps to go through his kitchen, I go in from the hall.

Q You turn left from the hallway and go into the kitchen?

A Yes, sir. 40

State's Witness, Mary Brennan, Direct

Q Here is the kitchen and here is the icebox; here is the closet, here is the stove and here is the sink, here is the toilet and here is the front window. Show us where you were.

A I cannot follow the map.

10 Q Where were you sitting, without regard to the map?

A I was sitting at the end of the table.

Q Here is the table and here is the toilet. Were you sitting there?

A In a chair.

THE COURT. If you don't understand the map don't try to point it out on the map.

WITNESS. No, sir, I don't, because I never followed a map.

20 Q You were sitting at the table facing the door when Jerry came in?

A Yes, sir.

Q Where was Caputo?

A Caputo was standing, was in fact up against this door, towards the bedroom door.

Q In back of you?

A No, not in back of me.

Q Alongside of you?

30 A I was sitting on the chair at the table facing the stove and Joe was standing at the end of the stove.

Q You were facing the bedroom?

A Facing the bedroom. The table is facing the bedroom.

Q And the chair was also facing in that direction?

A In that direction.

Q Now, Caputo was directly to your left or to your right or in front of you?

40 A Why, the door opens to the left and Caputo

State's Witness, Mary Brennan, Direct

was in the doorway to the right.

Q Caputo was standing in the doorway?

A Jerry was.

Q Now, as you were sitting at this table, facing the bedroom, where was Caputo?

A Standing by the stove.

10

Q That is to your left?

A Yes, sir.

Q Now, then how do you know that Jerry was in the doorway?

A Because he spoke to Joe in Italian and I looked towards the door.

Q And as you looked towards the door who was there?

A Jerry.

Q And you heard two shots fired?

20

A Yes, sir.

Q Where was Tamburro at the time the first shot was fired?

A Tamburro was sitting in the chair alongside of the bedroom door.

Q Facing whom?

A Facing me.

Q He was facing the front of the building?

A He was facing the front of the building.

Q Who did Treficanto aim at when he fired the first shot?

30

A At Joe.

Q And did he fire the two shoots in succession or first one and then another later on?

A Well, in succession I heard the two.

Q Then, what did Joe Caputo do?

A Joe Caputo ran into the bedroom.

Q What room?

A The bedroom.

Q Did he come out?

A He came to the door, not out of the room, 40

State's Witness, Mary Brennan, Direct

but inside of the door.

Q He was in the bedroom but in the doorway facing the kitchen?

A Yes, sir.

Q What did he have in his hand?

10 A I can't say, but I heard shots.

Q How many shots did he fire?

A Three shots.

Q In rapid succession or at some interval?

A At intervals, a little in between.

Q And where was he aiming?

A At the door, at the kitchen door.

Q And who was at the door?

A Jerry.

Q And could you see Jerry when these shots rang out?

20 A Yes, when Joe fired Jerry backed out in the hallway.

Q Then, did Jerry do any more firing?

A Well, two shots came through the window. I cannot say whether Jerry fired them from the window or not.

Q And how soon after Jerry removed himself from the doorway, after he fired two shots, and after Caputo had fired, did the two shots come through the window?

30 A Right away.

Q Where was Tamburro when the two shots came through the window?

A He was standing on the floor in front of the icebox.

Q Was he on the floor—

MR. SIMANDL. He was standing on the floor, you said.

Q How was he standing on the floor?

40 A He was standing on the floor facing the bedroom window.

State's Witness, Mary Brennan, Direct

Q He was facing to the door?

A Towards the bedroom, facing towards Joe in the bedroom.

Q Facing towards Joe?

A Yes.

Q And when the three shots rang out he was facing Joe or was he facing toward where Jerry was? 10

A He was facing Joe.

Q And did he stand between Joe Caputo and Jerry Treficanto?

A I can't say, I seen him standing there because I did not look no more once the shots were fired, I seen him standing there.

Q You told us that Joe Caputo was in the doorway of the bedroom facing the kitchen? 20

A Yes, sir.

Q Inside of the bedroom near the doorway facing the kitchen?

A Yes, sir.

Q And you told us that Jerry Treficanto was at the doorway of the kitchen?

A Yes, sir.

Q And that Tamburro was standing up on the floor near the icebox?

A That is the man who got shot.

Q Now, is the icebox between, between where he stood, between Joe Caputo and Treficanto? 30

A Yes, sir.

Q And is it in a straight line?

A No, it is cat-acornered.

Q Now, did Tamburro at any time face Jerry Treficanto?

A No, I didn't see.

Q Now, when you heard the first shot, what did you do?

A I went—I wanted to get into the hall, but 40

State's Witness, Mary Brennan, Direct

I could not get in there, because the toilet door comes out instead of coming in.

Q What did you do, then, what did you do?

A Then, when the two shots came through the window I put my head under the sink. I did not look no more until the shooting was all over.

10 Q Did you maintain your same position when Joe Caputo fired the three shots at Jerry Treficanto?

A No, I looked back and I wanted to get into the toilet and I did not go there, I could not get in—

Q So that you were not exactly towards Treficanto and Caputo and Tamburro.

A No, sir.

20 Q You were looking over their shoulder?

A Yes, sir.

Q Where was Waldron all this time?

A In the bedroom.

Q Where was Smith?

A In the bedroom.

Q And did you finally put your head under the sink?

A Yes, sir.

Q And that is alongside of the stove?

30 A Yes, sir. In between the toilet and the stove, in the corner.

Q You had your back toward the shooting?

A Yes, sir.

Q That was after you saw the three shots fired at Caputo?

MR. SIMANDL. Wait a minute. Let her tell the story, please.

A When the two shots came through the window, I seen the shots coming from the window I put my head under the sink.

40 Q Did you see the gun in Caputo's hand?

State's Witness, Mary Brennan, Direct

A I did not see the gun but I heard the shots.

Q Did you see anything in his hands, did he have anything in his hands when he fired the shots?

A His hands were closed, I could not see.

Q And you saw his closed hand and you saw these flashes, as you say, coming from his hand?

10

A Yes, sir.

Q And when you saw these flashes at that time, at the time you say Jerry Treficanto had his right hand raised and was backing in toward the hallway, you saw the flashes coming from his hand?

A Yes, sir.

Q Whatever was in the hand of Treficanto, was it big or small?

A I cannot say, he raised his hand too quick.

20

Q Now, after you went under the sink and the two shots came through the window, what did you do?

A I stayed there until after the shooting was over.

Q Then what did you do?

A I stepped into the bedroom to get my hat and coat, and it was dark in there, so I came out again and had nowhere to go, and I came out to the kitchen door and I met the officers and they took me back, and so when they came in they put their flashlight on the man who was lying on the floor and he was lying on the floor face down.

30

Q When this shooting was going on between Caputo and Treficanto was Caputo in the same position all the time or did he move around?

A I don't understand you.

Q When Caputo was firing his gun at Treficanto and Treficanto was firing at Caputo, did Caputo always stay in the same spot or did he move around in the kitchen?

40

State's Witness, Mary Brennan, Direct

A He stayed in the same spot I seen him in.

Q He stayed in the same position?

A Yes, he did not come out.

Q And was that when he was near the stove or when he was near the doorway?

10 A I don't remember seeing him near the stove.

Q When Treficanto raised his right hand and spoke in Italian to Joe, didn't you say Caputo was near the stove?

A That was before he done the shooting.

Q What kind of a light was in that room?

A A lamp.

Q What kind of a lamp?

A It was on the table.

20 Q Which way does that door open on the side that you were sitting, at or on the side of the bedroom?

A Which door do you mean?

Q That opened on the side toward the bedroom?

A That opens toward the bedroom, as you go in the bedroom it opens towards your righthand side.

Q Was there a door on the hinges in the doorway between the kitchen and the bedroom in Caputo's apartment?

30 A Was there a door on the bedroom?

Q Yes.

A I don't remember.

Q And to the best of your recollection, you don't remember whether you went into Treficanto's apartment or not?

A No, sir, I don't remember.

Q You might have gone there but you don't recall?

A I don't remember.

40 Q Was there any invitation extended to you to

State's Witness, Mary Brennan, Direct

go into Treficanto's apartment?

A No, sir.

Q Was there anything said about there being jealousy there.

A No, sir, not that I remember.

Q You don't remember anything being said about the old man being jealous? 10

A No, sir, I don't remember hearing that.

Q Did Caputo at any time put his hands on Treficanto?

A No, sir.

Q Or Treficanto lay his hands on Caputo?

A No, sir.

Q Did you see Tamburro at any time lay his hands on Treficanto?

A No, sir.

Q Or Treficanto lay his hands on Tamburo? 20

A No, sir.

Q They just fired at one another at the place that you mentioned?

MR. SIMANDL. I move to strike that out.

THE COURT. How many shots did you hear altogether?

WITNESS. Seven shots.

CROSS EXAMINATION By Mr. Simandl. 30

Q Mrs. Brennan, getting down to the time of the shooting, the first thing you saw was the door open, is that right?

A Yes, sir.

Q And when the door was open did you hear or see anybody?

A Jerry.

Q And did he do anything? 40

State's Witness, Mary Brennan, Cross

A He had raised his right hand, talked in Italian to Joe and raised his right hand.

Q Where was Joe?

A Standing at the stove.

10 Q What had he been doing before the door opened?

A He was talking in Italian to the man who got shot.

Q Before the door opened?

A Yes, sir.

Q And when the door opened did Jerry do anything?

A Jerry spoke first in Italian.

Q And what did Joe do?

A Joe just stayed there.

Q Then what happened?

20 A Jerry raised his right hand and opened on Joe.

Q Then what happened?

A Then I heard two shots and I seen the flash and Joe ran into the bedroom.

Q Where did the flash come from?

A From Jerry's hand.

Q And Joe ran?

A Yes, sir.

Q To the bedroom?

30 A Yes, sir.

Q Did he come out of the bedroom?

A No, sir.

Q He stayed in the bedroom?

A Yes, sir, he came as far as the door.

Q That is the door leading from the bedroom to the kitchen?

A Yes, sir.

Q And he fired twice. Did he fire towards the door?

40 A Yes, sir.

State's Witness, Mary Brennan, Cross

Q Towards the kitchen door?

A Yes, towards the kitchen door where Jerry was standing.

Q And Jerry still stood there?

A When Joe fired Jerry backed out into the hallway.

Q Did Joe do any firing after that?

10

A Well, he fired.

Q I say, after Jerry backed out and he fired those three shots from the bedroom after that, did Joe do any firing?

A Yes, sir.

Q He fired how many times?

A Three shots.

Q He fired three shots from inside the bedroom towards the door?

20

A Yes, sir.

Q After he fired those three shots did he fire any more shots.

A No, sir.

Q What did he do then?

A I don't know, I did not look exactly.

Q After he fired those three shots did you see the dead man?

A Yes, sir, he was standing in the door.

Q He was standing up?

A Yes, sir.

30

Q Where?

A In front of the icebox.

Q Did you hear any other shots?

A Yes, sir, two from the window.

Q Afterwards?

A Yes, sir.

Q And where did these shots come from?

A From the kitchen window.

Q Do you know who fired them?

A I don't know, sir.

40

State's Witness, Mary Brennan, Cross

Q After those two shots were fired did anything happen?

A I don't know what happened.

CROSS EXAMINATION By Mr. Wachenfeld.

10 Q Mrs. Brennan, how long have you known Joe Caputo?

A Three years.

Q And did you see him quite frequently during that time?

A Well, he used to come to visit to my husband and myself to our house several times.

Q Did you see him quite frequently during that time?

A Yes.

Q Did you go to see him at Fifteenth avenue?

20 A Yes, me and my husband had been there several times.

Q Your husband was always with you when you went to visit Joe, wasn't he?

A Not always.

Q Was he ever absent other than this time when the shooting took place?

A Yes, sir.

Q He was absent at other times?

A Yes, sir.

30 THE COURT. Were you ever there when your husband was not there except this time?

WITNESS. Oh, yes, I done work for Joe.

Q Well, did you go there to pay Joe a social visit?

A No, sir.

Q Only to work?

A Yes, sir.

Q And did you go there on this day to work for him?

40 A Yes, sir.

State's Witness, Mary Brennan, Cross

Q What work were you going to do?

A Clean his windows and put some curtains up, which he asked me to do.

Q What time did you get there to work?

A Half-past one.

Q How long did you stay there? 10 10

A Until I got arrested.

Q And did you do any work there?

A No, sir, he said he did not want to do it because it was nasty and snowing.

Q You knew it was nasty and snowing when you went there, didn't you?

A Yes, sir.

Q And he did not have to tell you the weather conditions, did he?

A No, sir.

Q Now, as a matter of fact, you went there, Mrs. Brennan, for what you got, that was a party and some whiskey and some wine, isn't that so? 20 10

A No, sir.

Q You went there to work?

A Yes, sir.

Q And when you went there and found out you weren't going to work, why didn't you go home?

A Well, I started to drink with the company.

Q Then, you did have a party?

A It wasn't an invited party. 30 10

Q Did you get drunk?

A I had some.

Q Were you intoxicated or weren't you?

A I had enough.

Q Were you intoxicated or weren't you?

A Yes, sir.

Q As a matter of fact, you were staggering all around there, weren't you?

A Yes, sir.

Q And so was everybody else drunk? 40 10

State's Witness, Mary Brennan, Cross

A Yes, sir.

Q And in fact, Laura Smith was put to bed by Joe Caputo because she was so drunk she could not stand up, isn't that a fact?

10 A Yes, sir.

Q And Louise Waldron was drunk enough so that she could put herself to bed, but she had to go to bed, too, isn't that a fact?

A Yes, she walked in herself.

Q And when you first came there you found Laura Smith in bed, didn't you?

A Yes, sir.

Q Did she have her ordinary street clothes on?

20 A She had some clothes on.

Q Well, she had some of them off, didn't she?

A Yes, sir.

Q And a good part of them off, didn't she, she had a good part of them off when you came there and saw her in bed at 1:30 or two o'clock that afternoon?

A I did not go into the bedroom.

Q You just told me she had some clothes off?

A Yes, she didn't have them all on when she was arrested.

30 Q Now, when you came there she got up and dressed herself, didn't she?

A Yes, sir.

Q Was she drunk at that time or sober?

A Partly drunk.

Q And did you ever meet this Laura Smith before?

A Yes, sir, once before.

Q Was Tamburro there at that time?

A No, sir.

40 Q He was not?

State's Witness, Mary Brennan, Cross

A He was there at that time but the time I met her in there—

Q I mean at 72 Hayes street, on this day in question, when you had this party at tea, or social afternoon, or whatever you might call it, he was there when you came there?

A Yes, sir.

10

Q And Caputo was there, wasn't he?

A Yes, sir.

Q Who else came into that room?

A Louise Waldron came in there.

Q And had you met Louise Waldron or known her before?

A No, sir, I never met her before.

Q Were you introduced to her when she came in?

A No, sir, she told me herself.

20

Q What did she say?

A She said she was Louise Waldron and told me where she lived.

Q Then Louise Waldron started to drink wine, didn't she?

A Yes, sir.

Q And then she started to drink whiskey, didn't she?

A Yes, sir.

Q And everybody in the place was drinking wine and whiskey, weren't they? 30

A Yes, sir.

Q And how long did Louise stay there?

A Until the shooting was over.

Q Did you know Jerry before, the man you refer to as Jerry Treficanto?

A I seen him once before.

Q But you did not know him to talk to?

A No.

Q When did he come in there?

40

State's Witness, Mary Brennan, Cross

A A few minutes before the shooting.

Q Isn't it a fact that you left that apartment and started to sleep yours off in Jerry's apartment?

A No, sir.

10 Q Sure about that?

A Sure.

Q Didn't you say just a few minutes ago that that might have happened?

A Well, I was there, I don't remember being in Jerry's house.

Q You had been in there, it might have happened without your remembering it, isn't that true?

A Well, I don't remember it.

Q Isn't that true?

20 A I don't remember it.

Q It might have happened?

A Yes, sir.

Q Now, when Jerry came in whom did he talk to?

A He talked to Joe in Italian.

Q Do you understand Italian?

A No, sir.

Q And you don't know what he said?

A No, sir.

Q Did Joe answer him back in Italian?

30 A Yes, sir.

Q You don't know what Joe said?

A No, sir.

Q How long was Jerry there that first time?

A I don't know.

Q Did Jerry talk to this girl Louise at that time?

A He asked her a question.

Q What did he say to her?

A He asked her to his place.

40 Q Do you remember the words he used?

State's Witness, Mary Brennan, Cross

A He said, "Are you coming out"?

Q He could talk that much English, could he?

A Yes, sir.

Q And what did she say?

A I don't remember.

Q Did anybody go out?

A Jerry went out.

10

Q And there wasn't any argument or fighting at that time, was there?

A No, sir.

Q How long before Jerry came back?

A When Jerry came back the second time?

Q Yes.

A In quite a little while he came back.

Q What do you mean, a half an hour an hour or what?

A Maybe twenty minutes.

20

Q And in the meantime Louise was drinking whiskey, wasn't she?

A Wine.

Q Wine and whiskey, is that correct?

A Wine and whiskey.

Q Now, when Jerry came back in about twenty minutes who did he speak to then?

A He was talking Italian to Joe and to the other man.

Q Was there any trouble then?

30

A No.

Q Did Jerry leave at that time?

A Jerry was talking at that time and he put his back to the door and there did not seem to be any trouble.

Q Did Jerry talk to Louise at that time?

A He asked her out again.

Q What did Louise tell him?

A I cannot say whether she would go or would not go.

40

State's Witness, Mary Brennan, Cross

- Q Do you remember what she said?
 A No, I did not hear it.
 Q How long did Jerry stay at that time?
 A About five minutes or so.
 Q Well, was there any difficulty there during
 10 that time?
 A No.
 Q Then did Jerry go out?
 A Jerry went out and he brought in Louise's
 coat and scarf and threw it in her lap.
 Q Did he say anything to her then?
 A He talked to Jerry in Italian but I don't know
 what he said.
 Q And how long did he stay then?
 A He didn't stay at all, he went right out after
 bringing in the scarf and the coat.
 20 Q And then how long did he stay away?
 A Two hours or two and a half hours.
 Q Now, during that two hours or two and a
 half hours you three women and these two men
 stayed in that apartment?
 A Yes, sir.
 Q And what were you doing then?
 A Drinking and talking.
 Q What else?
 A That's all.
 30 Q Do you remember when Caputo went out to
 get some wine?
 A Yes, sir.
 Q And do you remember what he said about
 leaving somebody in charge of the place while
 he was gone?
 A He said he would leave the man who had
 charge in charge of everything until he came
 back, and I don't know what he meant.
 Q What was he to be in charge of what?
 40 A I don't know.

State's Witness, Mary Brennan, Cross

Q And you did not hear him tell anybody at that time about what he meant, about being in charge of things, did you?

A No, sir, so when Joe went for the wine Laura Smith asked the man for a drink.

Q Now, after Caputo and Tamburro left the last time, before the shooting occurred, there wasn't any fight and there wasn't any hard feelings that you could see, was there?

10

A No, sir.

Q Did you remain in that apartment for the next two and a half hours?

A Yes, sir.

Q Are you sure about that?

A I don't remember leaving it.

Q Now, as a matter of fact, you don't know definitely whether you left there or not, do you?

20

A I don't know whether I left.

Q In other words, the whole thing is a haze, isn't it, you don't remember what happened, isn't that true?

A I remember the shooting and I remember the shots.

Q Is that the only thing that you remember? Won't you tell us frankly, is that all you remember?

30

A I remember the shooting, hearing the shots and I remember the way I put my head under the sink, and I remember Laura Smith going to bed.

Q Have you told us everything that you remember?

A Yes, sir.

Q Did you see a gun in Jerry's hand?

A No, sir.

Q Are you sure about that?

A Yes, sir.

Q Do you remember my asking you some ques-

40

State's Witness, Mary Brennan, Cross

tions some time ago and didn't you tell me that you saw a gun?

A No, sir, I told you that I did not see the gun.

10 MR. BOZZA. I will admit that Jerry had a gun.

Q Do you remember this question, Mrs. Brennan, "Did you see a gun in Jerry's hand? And your answer was "Yes, sir". Did you answer it that way?

A No, I don't remember that I answered it that way.

Q If it was down here in black and white would you say you did not say it?

20 A No, sir, I heard the shots and I saw the sparks.

Q Do you remember this question: "What kind of a gun was it?" "I cannot say, because the gun flashed so quick."

A I don't remember saying that.

Q "Did you see a gun?" Answer. Did you answer that way?

A I don't remember answering that way.

Q When Jerry came back after being absent for two and a half hours, what happened?

30 A He went into Joe's door.

Q He came to what?

A He went into his own house and came to Joe's door.

Q Do you remember that or are you just guessing?

A No, I remember that.

Q Were you arrested in this apartment or were you arrested outside?

A In the apartment.

40 Q What is the matter, couldn't you walk?

State's Witness, Mary Brennan, Cross

A Well, I was going to go out and I was excited there when I met the officers.

Q So with all the wine and the whiskey and the shooting you probably were excited, weren't you?

A Yes, sir.

Q What time did this shooting take place?

10

A I don't know, sir.

Q About what time?

A I cannot say.

Q Can you give us any idea?

A No, sir.

Q Can you tell us whether it was near seven o'clock or twelve o'clock at night?

A No, sir, I cannot tell you.

Q Why not? Why can't you give us some idea?

A I can't say.

20

Q But you remember seeing Jerry at the door, don't you?

A Yes, sir.

Q Where were you at the time you saw Jerry at the door?

A Sitting at the end of a table in the kitchen.

Q You remember those details, too, don't you?

A Yes, sir.

Q That is exactly where you were sitting?

A Yes, sir.

30

Q And where was Joe sitting?

A Standing at the stove.

Q You remember that, you are not drawing on your imagination, are you?

A No, sir.

Q You are telling me just what you saw?

A Yes, sir.

Q And you can remember all of that very distinctly?

A Yes, sir.

40

State's Witness, Mary Brennan, Cross

Q And you are sure about it?

A Yes.

Q Where was Joe?

A Down by the stove.

Q Which stove?

10

A In the kitchen.

Q Which portion of the stove? Take this.

A I don't know much about measurements.

Q Well, the map has the stove marked on it.
The officer will point it out to you.

THE COURT. No, do not try and point it out unless she understands. If you understand, point it out.

WITNESS. I don't know.

20

Q Look at this map.

A I cannot, because I never followed up a map.

Q Well, suppose you just look at this one and we will see what we can do. This is Caputo's bedroom.

MR. BOZZA. Kitchen.

Q Or, kitchen, rather. That little square is the stove. This is the sink and that is the closet. Where was Caputo seated at the time you saw Jerry come in the doorway?

30

A He was standing by the door, next to the bedroom door.

Q You mean at this end?

A Yes, toward the bedroom door.

Q Sure about that?

A Yes.

Q How far did Jerry go in the door at that time?

A He just got at the door.

40

Q Was the door open or closed?

State's Witness, Mary Brennan, Cross

- A He opened it himself.
- Q Opened it himself?
- A No, half open.
- Q You remember that detail?
- A Yes.
- Q Sure about that?
- A You have been in the custody of the author- 10
ities ever since this happened?
- A I do not know what you mean.
- Q Well, have you been home since this think
happened? Where have you been since this hap-
pened? Don't you know?
- A I know I was in the house of detention.
- Q And you girls have talked this thing over
together?
- A No.
- Q Didn't you tell me that Louise Waldron said 20
that Jerry Treficanto slapped her face, but you
didn't see it?
- A I didn't see it?
- Q Didn't you tell me that that is what Louise
told you?
- A No, sir, I didn't.
- Q Did Louise tell you that?
- A No.
- Q Sure about that?
- A No, she didn't tell me that. 30
- Q Where was the man who was killed, Tam-
burro, seated at the time that Joe was at this end
of the stove?
- A I could not tell by a map. He was sitting
alongside of the door.
- Q Which side?
- A The closet side.
- Q Well, now, just look at the map.
- A I cannot understand it by the map.
- Q Well, just look at the map and see if we 40

State's Witness, Mary Brennan, Cross

cannot help you. This is the door that goes into the kitchen. Nothing difficult about that? Do you understand that? Here is the table over here on the left hand side as you walk in, with an ice box on the right hand side and directly in front of you is the stove. Now, where was Tamburro seated or lying at the time that Jerry was at this door and Joe Caputo was at that point?

10

A Where is the bedroom door?

Q Here is the bedroom door right here.

A Well, he was seated near the closet door.

Q Well, there is a closet right there.

A No, nearer to the bedroom door.

Q Nearer to this door here?

20

A That is a bedroom door.

Q What did he do when the shot came?

A He got up off the chair.

Q Do you know who fired first?

A Jerry fired first.

Q How do you know?

A I heard the shot.

Q You heard the shot?

A Yes.

Q Did you see him?

30

A He raised his hand. I seen him raise his hand.

Q Did you see the shots Jerry fired, or did you see the gun?

A I did not see the gun. I seen the shots.

Q How many shots did Jerry fire?

A Two.

Q How many did Joe fire?

A Three.

Q How many did Tamburro fire?

40

A He didn't fire any shots. That was the man that got shot.

State's Witness, Mary Brennan, Cross

Q How do you know Tamburro did not fire any shots?

A I did not see him.

Q You did not see him fire any?

A Who is Tamburro?

Q That is the man that got shot?

A I didn't see him. 10

Q Where was he when you last saw him?

A Standing by the ice box on the floor.

Q Now, as a matter of fact, weren't you asleep?

A No, I was not asleep.

Q Over in the other apartment, in Jerry' Treficanto's apartment?

A No.

Q Are you sure about that?

A Yes.

Q Didn't you tell me a half a dozen times—not that—that is exaggerated. Didn't you tell me twice that you were so intoxicated that you might have been sleeping in Jerry's apartment? 20

A No, I didn't say I might have been sleeping in Jerry's apartment.

Q What did you say?

A I said I might have been there.

Q What? You said you might have been there.

Is that what you said? Is that what you said, Mrs. Brennan? 30

A I do not remember.

Q Now, isn't this a fact, that you were so intoxicated that you do not know where you were and you were so intoxicated that you do not know what happened?

MR. BOZZA. I object. It has been answered a half a dozen times.

THE COURT. She answered that already.

Q Isn't it a fact, Mrs. Brennan, that you were 40

State's Witness, Mary Brennan, Re-direct

not in this room when the shooting occurred at all?

A Yes, I was in the room when the shooting occurred.

10 Q Isn't it a fact that you were sleeping over in Treficanto's apartment when the first shot was fired?

A No.

Q Who struck Jerry Treficanto?

A Nobody that I could see.

Q Was he wounded?

A Not that I could see.

Q Do you know that he was treated at the City Hospital for wounds that he received?

A No. I saw him down at police headquarters.

20 Q When you saw him at police headquarters, was he bound up with bandages?

A No, sir.

REDIRECT EXAMINATION By Mr. Bozza.

Q You do not know whether a bullet from Jerry's gun grazed his head?

A No.

30 Q Now, as a matter of fact, didn't this quarrel start because you saw Laura Smith partially dressed in bed in Joseph Caputo's apartment and to make him jealous you went over to Jerry Treficanto's room?

MR. WACHENFELD. I object to that.

THE COURT. I think it is a leading question.

40 Q Wasn't there a fight in that house because you went into Treficanto's room and Laura Smith occupied the bed of Joseph Caputo?

State's Witness, Mary Brennan, Cross

MR. SIMANDL. Is this redirect?

THE COURT. It does not seem to be re-direct.

MR. SIMANDL. I object to it.

THE COURT. She said there was no fight. 10
Did you not see any fight?

WITNESS. No.

Q Now, Mrs. Brennan, tell me this. While you were confined in the house of detention, did you speak to counsellor Simandl, that gentleman over there?

A Yes.

Q Did you speak to counsellor Wachenfeld?

A Yes. 20

Q Did you ever see me in your life before?

A I do not remember.

CROSS EXAMINATION By Mr. Simandl.

Q When we were there speaking to you, this gentleman, Mr. Coccozza from the Prosecutor's office was seated there also?

A Yes. 30

CROSS EXAMINATION By Mr. Wachenfeld.

Q Did you ever talk to Mr. Simandl or myself not in the presence of Mr. Bozza or a representative of the Prosecutor's office?

MR. BOZZA. I object to that on the ground that part of that statement has a false basis. Probably counsel forgets that never did he speak to this witness in my presence because 40

State's Witness, Frederick G. Schalk, Direct

I never saw this witness until she appeared in court this morning.

MR. WACHENFELD. I do not think that is important.

10 RECESS from one to two P. M.

AFTER RECESS

FREDERICK G. SCHALK sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

20 Q You are a member of the Newark police department connected with the 4th precinct?

A Yes.

Q On the night of March 10, 1928, did you go to premises 72 Hayes street?

A I went to 72 Hayes street, rear house.

Q And what time was it?

A It was about between the hours of 10:35 and 10:45 P. M.

Q And when you came there, who did you see?

30 A Why when I came into the house 72 Hayes street, I entered the kitchen in the left apartment—the first floor left—and I seen officer England with two women and one man, keeping them under custody, and I seen a person lying there, but I didn't know at the time the person was dead, until later examination I knew he was lifeless.

Q Now, did you leave the premises or remain there?

A I remained at the premises that whole night until the following morning of the eleventh; at

40

State's Witness, Frederick G. Schalk, Direct

8:30 A. M. I left.

Q And did you see Mr. Day, the photographer?

A No, sir.

Q You left at 11 A. M. on the following morning?

A Yes, 8:30 A. M.

Q Now, that night did you keep watch over the two apartments of the first floor rear of 72 Hayes street?

A Yes.

Q Was anything disturbed or molested in the two apartments?

A Not until there was further evidence to be looked after. There was nothing disturbed outside of the men for evidence from headquarters. There was nothing disturbed, but they were looking for evidence. I do not know whether they moved chairs or not, or what they done. I am not sure about it.

Q Now, I show you Exhibit S-3 and I ask you whether that portion of the bedroom in the right apartment is featured in the same condition on this photograph as you found it when you came to the premises?

A That is not the room where the shooting occurred.

Q No, that is next door;

A No, that bed was not upset. It was neatly done up with a woman's coat lying over here in this corner, but the bed was not upset in any way.

Q But with the exception of the condition of the bed itself, that portion of the apartment is in the same condition as you saw it?

A The same condition, as I stated.

Q And the only purpose why that was upset—

A To investigate and look, and I was the one who helped look for evidence at the time.

10

20

30

40

State's Witness, Frederick G. Schalk, Direct

Q Now, I show you Exhibit S-7 and I ask you if that portion of the kitchen of Caputo's apartment and that portion of the bedroom featured in that picture is in the same condition as it was when you first saw it?

10 A Yes.

Q And I ask you the same question with reference to S-4, which is merely the front of the rear building.

A That is the front of the building and this is a shed in between the front of the building, and this is the rear building where this occurred.

Q And, of course, that is featured in the same condition it was as when you first saw it?

20 A To my knowledge it was dark at the time I came in.

Q Now, I show you Exhibit S-5 and I ask you if that portion of the kitchen of Caputo's apartment is featured in the same condition it was in the photograph that first night you saw it?

A That is the apartment on the left?

Q Yes.

30 A There was three chairs there—four chairs. Well, as I can remember, the chairs are not exactly, I would say, in the same position as they were when I come in. I could not figure to the inch or foot, but they were something in that order, to the rear where the stove was.

Q I ask you the same question pertaining to Exhibit S-6.

A That looks like to me the bed in the left apartment where the shooting occurred.

Q Exactly?

40 A And the bed was just in an upset condition as it is now. The blankets may have been just a little disarranged. It was upset with a woman's corset lying on the left. There was a window

State's Witness, Frederick G. Schalk, Direct

opened from the bottom.

Q Now, I am confining my question merely to that portion of the apartment featured in this picture.

A That is the apartment I seen.

Q And I direct the same question to Exhibit S-2, which is the kitchen of Treficanto's right hand apartment.

10

A The chairs were not exactly arranged in this line, but they were in the kitchen at the time, but not arranged the same as they are there, and that is the apartment I also kept under surveillance and watched through the night.

Q But no person other than an officer, I understood you to testify, touched or disturbed anything in the two apartments?

20

A No one outside of the men who had proper credentials to look over things were allowed to disturb things while I was there.

MR. BOZZA. I offer the pictures subject to whatever change has been testified by the officer, because the State will contend that, with reference to those things which have been described changed, such as chairs and bedding, have no materiality in the case at all, that they are offered generally for the location and appearance of the respective apartments.

30

MR. WACHENFELD. I will make the same objection to the pictures being marked in evidence with the understanding that they do not portray the particular condition of the premises at the time this occurrence happened.

THE COURT. What do you say Mr. Simandl?

MR. SIMANDL. That is my understanding.

40

State's Witness, Louise Waldron, Direct

THE COURT. Very well, they will be admitted.

10 MR. BOZZA. And that they do not portray the furniture being in the same position, or the chairs and the bed, only the ice box and stove are in the same position.

THE COURT. They are in evidence.

CROSS EXAMINATION waved.

LOUISE WALDRON recalled in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

20 Q Where do you live?
 A 43—I did live at 43 Boyd street.
 Q On March 10, 1928, where did you live?
 A 33 Boyd street.
 Q Are you married or single?
 A Married.
 Q On March 10, 1928, did you go to the house of Jerry Treficanto?
 A Yes.
 Q At what time?
 30 A At ten o'clock in the morning, about; it might have been a little after ten.
 Q What was the purpose of your going there?
 A To clean.
 Q How often had you done that?
 A Well, I had done that four or five months.
 Q And did he pay you for your services?
 A Yes.
 Q How much did he pay you?
 A \$1.25.
 40 Q For every Saturday morning's cleaning?

State's Witness, Louise Waldron, Direct

A Yes.

Q Do you recall cleaning the apartment that day?

A Yes.

Q You started in to work shortly after you arrived?

A Yes.

10

Q How long did you work?

A I worked from about half past ten till twelve o'clock.

Q What did your cleaning consist of?

A Just cleaning, outside of a few things I did not do.

Q What time did you stop doing any cleaning in Treficanto's apartment that day?

A Twelve o'clock.

Q Was Treficanto there when you came?

20

A Yes, he was upstairs.

Q What?

A He was upstairs.

Q And what is there upstairs above Treficanto's apartment?

A Two rooms and a lady and her husband was upstairs, Italian people.

Q But he hasn't anything to do with that apartment?

A No, sir.

30

Q He was merely visiting?

A Yes.

Q When did you see him again?

A Well, he came down and said he was going over to Bank street and that he would be right back, that I was boss of the house, and he did not come back until nearly two o'clock.

Q Now, from ten until two, did you stay in Treficanto's apartment?

A Yes.

40

State's Witness, Louise Waldron, Direct

Q When he came back, did he have anything with him?

A Some fish.

Q Cooked or uncooked?

A Cooked.

10 Q What did he say?

A He said, "I have some fish, do you like it?" And I said, "Yes," and he said to eat it, and I ate it.

Q Now, did he eat the fish with you?

A No.

Q You had it all?

A Yes. There was only about three fishes there, three little smelts.

Q Now, after you ate the fish, did you remain in the apartment?

20 A Just a few minutes. I said I was going next door to speak to Laura Smith, because I was told she could speak German.

Q How did you know she was there?

A Well, I seen her the day before and I said I had a little trouble with my husband.

Q You went on Friday to ascertain whether you had the work the following morning?

A Yes.

Q And you went to see Louise?

30 A No, Laura Smith.

Q And when you went into Caputo's apartment, whom did you find there?

A Laura Smith, Mary Brennan, and the man who got shot.

Q Was Joe Caputo there?

A Yes.

Q What were they doing?

A Drinking wine, and I was offered a glass of wine and a sandwich.

40 Q Did you drink wine?

State's Witness, Louise Waldron, Direct

A Yes.

Q Did you eat the sandwich?

A Yes.

Q Now, as you were eating and drinking, did anybody come in?

A Yes.

Q Who?

10

A Well, I always called him Jerry.

Q Who was Jerry?

A I don't know his last name, the man with the brown coat.

Q Now, when he came in there, what did he say and what did he do?

A He came in and he said, "Louise, come over right away." He wanted to go out, and I said, in a few minutes, and I didn't go over, so he went back.

20

Q Then did he stay or did he leave?

A No, sir. They offered him a glass of wine and he wouldn't have it.

Q Did he stay or leave?

A No, he left.

Q Did he come back again?

A Yes.

Q How long after?

A About a few minutes after.

Q What did he say this time?

30

A He said, "Are you coming over," and I told him in a few minutes.

Q Did he stay or leave?

A No, he went out.

Q Did you go in a few minutes?

A No.

Q What did you do when you continued to stay with the company?

A Well, I was interested in the company; I was enjoying myself.

40

State's Witness, Louise Waldron, Direct

Q Drinking and eating?

A Yes.

Q And speaking German to Miss Smith?

A Yes.

Q Did he come back?

10 A Yes.

Q And how long after the second visit did he come back?

A He stayed out about five or six minutes and come back with my coat and scarf and threw it on my lap and slapped me in the face and told me to stay where I was and went out.

Q What did you do about it?

A I said he had no right to hit me. I said he must be yellow.

20 Q Did anybody in the place say anything about it?

A No.

Q Did he stay or did he leave?

A What is that?

Q Did Treficanto, after slapping you in the face, stay or leave?

A He had no right to.

Q Did he stay or leave?

A He left.

Q Did you see him again?

30 A No, not until a couple of hours after?

Q When you saw him a couple of hours after, where did you see him and under what circumstances?

A Well, Laura Smith went to bed; she threw herself on the floor and Mary Brennan and I wanted to pick her up and put her to bed and she told us that Joe would put her to bed, and Joe picked her up and put her to bed, and she laid down a few minutes, and I got kind of sick from the drink and I laid down behind her for a couple

40

State's Witness, Louise Waldron, Direct

of hours, and I happened to hear a little loud talking and I put my head over Laura's shoulder and I seen Jerry like that (indicating) with a gun in his hand.

Q You saw Jerry with a gun in his hand?

10

A Yes.

Q Now, as you put your head over Laura's shoulder and you saw Jerry with a gun in his hand, kindly point out to us just where Jerry was. I will first explain the map to you. Here is Hayes street. Here is the house facing the sidewalk. This is the alleyway. This is the corridor that separates Treficanto's apartment and Caputo's apartment, and that is the door leading into Caputo's apartment. This is a bedroom, here is the bed. Now, as you looked over the shoulders of Laura Smith, and you saw Jerry, where was Jerry?

20

A Between the hall and the door facing the room.

Q He was facing the bedroom door?

A And stood between the hall and kitchen.

Q In the doorway?

A No, between the door and the hall.

Q What did he have in his hand?

A A gun.

30

Q Was it a large or small gun?

A Small gun and dark.

Q Can you say from these three guns which one you think he had at that time? (Witness indicates) This one. Now, then, while he had that small gun in his hand standing in the doorway, what did he do?

A He began to shoot.

Q In what direction did he shoot?

A Toward the bedroom door.

40

State's Witness, Louise Waldron, Direct

Q And he was standing in and around the bedroom door?

A I did not see anybody who was standing there. I put my head back as I heard the first shot.

10 Q You heard the first shot and put your head back?

A Yes.

Q Immediately after the first shot did you continue to look in the kitchen?

A No.

Q Did you look in the bedroom?

A Well, I looked down and I saw Joe going behind the bed and stoop down.

Q And what did he have in his hand?

A A gun.

20 Q Was the gun a large one or a small one?

A I could not tell you. I did not see it.

Q Did he shoot?

A Yes, I heard three shots.

Q Did you see the flash of the shots?

A Yes.

Q From the gun of Caputo?

A Yes.

Q And in which direction was Caputo in?

A Well, he was cata-cornered in behind the bed.

30 Q Kindly point in this bedroom where Caputo stood when you saw him with the gun in his hand firing the three shots?

A Right between the trunk.

Q Between the bed and the trunk?

A Yes.

Q Now, then, will you tell us in what direction he was shooting?

A Yes.

40 Q Point with your pointer on that map in what direction he was shooting?

A (Witness points.)

State's Witness, Louise Waldron, Direct

Q Shooting down in this direction?

A Yes.

Q When you looked over the shoulder of Laura Smith, did you see that doorway and could you see Treficanto in that doorway?

MR. SIMANDL. Will you make a mark where he stood? 10

MR. BOZZA. Yes. Between the bed and the trunk.

MR. SIMANDL. How is that marked.

MR. BOZZA. C, without any numerals.

Q Now, then, you could see Jerry in that doorway?

A In between the doorway. 20

Q And when you pointed out where Caputo stood, was that behind your gaze as you looked over?

A Yes.

Q Now, have you stood at that point at any time to see if you could see the doorway through this door leading from the kitchen into the bedroom?

A Well, I can see.

Q Now, then, where was Tamburro when this shooting was going on? 30

A I do not know.

Q You do not know?

A No.

Q You could not see Tamburro?

A No.

Q Now, when was the first time after you saw the three shots fired and heard the shots fired from Caputo's gun—what did Caputo do?

A He just stayed there. That is all I saw. He did not move while I was there. 40

State's Witness, Louise Waldron, Direct

Q Well, what did you do after you heard the three shots?

A Well, the shots were all fired—I got out of bed and Joe Caputo told all of us women to get the hell out of the house.

10 Q Did you get out of the house?

A Yes. I went out. I went out darn quick, and before I went out, I passed and I happened to see this man lying on the floor with his face facing the bedroom.

Q And was his face up or down?

A Down.

Q And where was his head?

A Facing the bedroom.

Q And in which direction did his feet point?

20 A That way. (Indicating).

Q Alongside of the icebox?

A Yes.

Q And would you say his head was there (indicating)?

A Yes.

Q And his feet in this direction?

A Yes.

Q Alongside or parallel with the icebox. What did he say, the man who was shot?

30 A I seen him kind of raise, and as he raised he moaned, and I saw two spots on each side of his chest.

Q Now, then, when Caputo fired the three shots, was Tamburro standing in that doorway?

A I could not tell you. I did not see.

Q You were looking at the gun?

A I was afraid to look through here and I just kept in the bed between Laura Smith.

Q After you heard the three shots and saw the flash of the three shots, what did you do?

40 A I didn't do anything. I just laid there.

State's Witness, Louise Waldron, Direct

Q Did you see any fire from Jerry?

A Three shots I heard, but only one I heard from the kitchen. I don't know where the other two came from.

Q You heard three shots from each gun?

A Yes.

Q Now, then, these shots that came from Caputo's gun, did they come in rapid succession, or did they come at intervals?

A Rapid succession, one right after another.

Q And the three shots that came from Treficanto's gun, did they come in rapid succession?

A Yes, one right after another.

Q Then afterwards was there a pause and did you hear more shots?

A No, sir.

MR. BOZZA. Now, if your Honor please, I offer the small gun in evidence, being the gun that Treficanto had in his hand when she first saw him.

(The same is marked Ex. S12.)

Q Now, then, did you afterwards continue to stay in that bedroom?

A Yes, until the shooting was all over.

Q Now, did you see any shots coming through the window or did you hear any shots?

A No, sir.

Q And to the best of your recollection how many shots did you hear altogether?

A Six.

Q Now, then, who was the first one to leave the bedroom, Caputo, you or Laura?

A I was myself.

Q You were the first one to leave?

A Yes, sir.

State's Witness, Louise Waldron, Direct

Q And when you left where did you go?

A I went right home.

Q You went right home?

A Yes, sir, over Hayes street to Springfield avenue, down Springfield avenue to Bergen and I went right home.

10 Q When you came from the bedroom, coming into the kitchen, did you go over the body of Tamburro, did you walk along side of it?

A No, he wasn't near the doorway, because I could walk sideways.

Q Now, then, when Caputo was firing at Treficanto, and when you heard, and when Caputo was firing back——

MR. SIMANDL. Wait a minute, why——

20 MR. BOZZA. Because that is what she testified to.

MR. SIMANDL. She hasn't said so.

MR. BOZZA. She not only said she heard the shots but she saw flashes from Caputo's gun.

(Question withdrawn.)

30 Q At any time that the firing was going on that you testified to did you hear Tamburro say anything?

A No, sir.

Q At any time that you heard the firing did you see Tamburro in your line of vision at all?

A No, sir.

Q Now, before you saw Caputo come into the bedroom as you testified, you heard how many shots?

40 A Three, one from the doorway first, Jerry first.

States' Witness, Louise Waldron, Cross

Q Then what did you next hear?

A Well, I seen Joe running into the bedroom and stoop down and then I seen him fire.

Q So that Caputo fired three shots and Treficanto fired only one?

A Well, Jerry fired, too, but he started firing and I only heard one first from Jerry and then I heard two more of Joe's firing, so they both were shooting at one another. 10

Q As I understand you, Treficanto fired the first shot and then you saw Caputo run in and get his gun and immediately fire three in rapid succession and then you heard two more from Treficanto? is that right?

A Yes, sir.

Q And they were firing at each other?

A Yes, sir. 20

CROSS EXAMINATION By Mr. Simandl.

Q Miss Waldron how many times have you been in Joe's house?

A Once.

Q Can you tell us whether or not, standing here, you can see all the way in here?

A Yes, you could see.

Q You can see all the way in here? 30

A Yes, sir.

Q And standing in here you can see out here, is that right?

A Yes, sir.

MR. SIMANDL. I indicate in my first question from the kitchen door into the bedroom and my second question from a point of the trunk out toward the kitchen door.

Q The first thing, getting right down to the 40

States' Witness, Louise Waldron, Cross

time of the shooting, you were lying up against the window?

A Yes, sir.

Q And the first thing you heard was talking?

A Yes, sir.

10 Q At that time could you see Joe?

A No, sir.

Q Could you tell whether he was in the house or not?

A I heard him talk but I couldn't see him.

Q Did you look then?

A No, sir.

Q And when you first looked what did you see?

A I seen Jerry's hand and then a shot.

20 Q At that time where was Joe?

A I don't know I did not see where he was.

Q Well, did he run?

A Well, after the first shot he ran to the bedroom.

Q And reached over into the trunk?

A He stopped down.

Q Well, when he went into the bedroom he had nothing in his hands?

A Yes, sir.

Q And he stopped down to this trunk?

30 A Yes, sir.

Q And he took out the gun?

A Yes, sir.

Q And placed himself in back of the bed, between the bed and the trunk?

A Yes, sir.

Q You were on the bed?

A Yes, sir.

Q And Miss Smith was on the bed?

A Yes, sir.

40 Q He took the gun and fired toward the door?

State's Witness, Louise Waldron, Cross

A Yes, sir.

Q Did you see Jerry standing there?

A Yes, sir.

Q Jerry was still there?

A Yes, sir.

Q Did you see where Jerry went when he started to fire? 10

A No, sir.

Q Did you see where Jerry went or where Jerry disappeared after shooting?

A No, I heard the shooting and after Joe started to fire I put my head back and I did not see Jerry.

Q Now, after Joe started to fire you heard shots from Joe's gun?

A Yes, sir.

Q Did you hear any other shots? 20

A I heard two more shots.

Q While Jerry was firing?

A Yes, sir.

Q Do you know where they came from?

A No, sir.

Q Did they come from out of the bedroom in which you were?

A I didn't look.

Q Did you hear them in this room or did they come from that room? (Indicating.) 30

A The two shots seemed to come from the kitchen way, yes, sir.

Q Towards the bedroom?

A Yes, sir.

Q And that was while Joe was firing?

A Yes.

CROSS EXAMINATION By Mr. Wachenfeld.

Q Miss Waldron, where did you meet Laura 40

State's Witness, Louise Waldron, Cross

Smith, or where did you meet Laura Smith on the night before?

A In Joe Caputo's house.

Q So, you were in Caputo's house Friday night, were you?

10 A Yes, sir.

Q How long were you in there?

A I was not in there only a few minutes, I did not even go in the house, I stood at the door.

Q Who were you talking to?

A I was talking to Laura Smith.

Q What time of the night was that?

A I cannot tell you, it was dark, but I can't tell you.

Q How long had you known Laura Smith?

20 A That was the first time I met her.

Q Did anybody introduce you to her?

A No, sir.

Q And was Caputo there at that time?

A Yes, sir.

Q This man Tamburro at that time?

A Yes.

Q Did you have a drink then?

A No, sir.

Q When did the drinking start?

A Saturday.

30 Q What time?

A Well, they were drinking before they went in the house, before I got there.

Q Were you drunk?

A I didn't have any.

Q You didn't have any what?

A Until I got in Joe's house.

Q When you got to Joe's house before this shooting took place?

A No, sir.

40 Q Was Laura Smith drunk?

State's Witness, Louise Waldron, Cross

A Not before the shooting—yes, we were drunk before the shooting went on.

Q You were drunk?

A Yes, sir.

Q And Laura was drunk?

A Yes, sir.

Q Good and drunk, wasn't she?

10

A Yes, sir.

Q So drunk that she had to be put to bed?

A No, I went to bed myself.

Q I am talking about Laura.

A Oh, why, Laura, yes sir.

Q You were in good enough condition that you could go to the bedroom and go to bed yourself.

A Yes.

Q Now, you say you and Laura were sleeping there for a couple of hours, is that correct?

20

A Yes, sir.

Q What time did the shooting take place?

A About eight o'clock, as I said this morning, I don't know, it was dark anyhow.

Q You think it was about eight o'clock, do you?

A About that, I think.

Q Is that your best recollection of it?

A The best I can tell you.

Q Now, after the shooting was all over Caputo told you women to get the hell out of there, what did Laura say about getting out?

30

A She said, "Like hell I will," and I run out.

Q Laura didn't like the idea of getting out, did she?

A No, sir.

Q She stayed there while you went out?

A She was in the bedroom when I went out.

Q You were in bed when you heard all this shooting were you?

A Yes, sir.

Q Whereabouts in that bed, which side of it?

40

State's Witness, Louise Waldron, Cross

- A On the right hand side going towards the hall.
- Q Would that be nearest the wall where the window is?
- A Yes, sir.
- 10 Q And where was Laura?
- A In the front of the bed.
- Q When the shooting started up Laura got out of bed?
- A What did you say?
- Q When the shooting started Laura got out of bed?
- A Not when the shooting was going on.
- Q She stayed right in bed there all the time? Did she, until it was all over?
- A Yes, sir.
- 20 Q And you saw all of this by creeping over Laura and looking over her shoulder, is that right?
- A Yes, sir.
- Q Don't you know as a matter of fact that Laura fell out of bed when the first shot was fired?
- A No, she did not fall out bed, she wasn't out of bed even when I got out.
- Q Don't you know, as a matter of fact, that Laura was standing up when all this shooting was going on?
- 30 A No, she was not, she was laying down.
- Q So if Laura said she was standing up, that is not true, is it?
- A No, she was laying down.
- Q Are you sure about that?
- A Yes, I know about that.
- Q How long did you hear this quarrel before the first shot was fired?
- A Well, I can't tell only about a few minutes,
- 40 I guess.

State's Witness, Louise Waldron, Cross

Q How many minutes?

A I cannot recollect.

Q Why, is your memory bad?

A I cannot remember how long.

Q Would you say it was as long as ten minutes?

A I can't tell you. 10

Q You remember talking to me before, don't you?

A Yes, I talked to you before, but I can't tell you how long the talking was going on.

Q Did you tell me before that the argument took place for about ten minutes?

A No, sir, I did not.

Q Do you remember this question—"How long did the quarrel last when you heard the shots?" Answer: "About ten minutes." Did you answer that way? 20

A No, I did not.

Q You did not answer that way?

A I don't remember.

Q Well, you say you did not answer it that way?

A I don't remember telling you that.

Q Now, how long did the quarrel last?

A I can't tell you.

Q, Can you give us some idea? 30

A No, sir, I cannot.

Q Was it as long as ten minutes?

A I can't tell you.

Q Was it less than ten minutes?

A I can't tell you.

Q Can you give us some idea?

A I can't tell you.

Q You cannot give us some idea?

A No, sir.

Q What did the quarrel consist of? 40

State's Witness, Louise Waldron, Cross

A I don't know. They were talking in Italian and I can't tell you.

Q Do you understand Italian?

A No, sir.

10 Q How do you talk to Charlie, as you call Treficanto?

A I never talked Italian because I cannot, he spoke English to me.

Q Now, he came over into this apartment after you went, to Joe Caputo's apartment, he came over to see you three different times?

A He asked me to come over to the house and get my things, he wanted to go out, and he did not pay me my money.

20 Q He asked you to come back to his apartment to finish your work?

A No, sir. He did not say anything about finishing the work.

Q What did he ask you?

A He asked me to come over that he wanted to go out.

Q What did you think he wanted you to come over for?

A To come over to get my things, my coat and my scarf were over there—and he always goes out—

30 Q He was objecting to your having your coat and scarf there?

A Well, he wanted to go out.

Q So when, you left, after the shooting was all over, you took your coat and scarf, didn't you?

A Charlie brought them and threw them in my lap.

Q And when you went out of Caputo's apartment, after the shooting was all over, you had your coat and scarf with you, didn't you?

40 A Yes, sir.

State's Witness, Louise Waldron, Cross

Q So that the coat and the lady's hat that was found in Caputo's room by the police officers was not yours, was it?

A No, sir.

Q What did you say Jerry, or Treficanto, after he asked you the first time to come back?

A Well, I just stayed there, because I was interested, that's why. 10

Q What were you interested in?

A In the wine.

Q How about the whiskey, didn't that have any interest to you?

A The wine, because I have none home.

Q Did you drink some of the whiskey, too?

A Yes, I had one little drink, one glass full.

Q Now, you say that Jerry finally slapped you in the face when he put your hat and coat in your lap, is that right? 20

A Yes, sir, he did.

Q And that did not start an argument, did it?

A I don't know, I said he had no right to hit me.

Q It did not start an argument, did it?

A No, sir, not that I know of.

Q You merely made the remark that Jerry was jealous, is that right?

A Yes, sir. 30

Q And then you all had another drink, is that right?

A Yes, sir.

Q Then Jerry went out?

A Yes, sir.

Q And after Jerry went out Laura fell on the floor, didn't she?

A Threw herself on the floor.

Q And that is when Joe Caputo put her to bed?

A Yes, sir. 40

State's Witness, Louise Waldron, Cross

- Q And right after that you went to bed?
A Yes, sir.
Q You were sleeping your liquor off about two and a half hours?
A Trying to sleep anyhow.
10 Q Well, didn't you sleep?
A I slept a little, yes, sir.
Q Do you think you slept for about two or two and a half hours?
A No, sir.
Q How long do you think you slept?
A I don't really know. I don't know how long I slept.
Q Well, did you tell us a little while ago that it was about two or two and a half hours?
A I got up when I heard the loud talking.
20 Q Didn't you tell us a little while ago that you thought it was two or two and a half hours?
A I cannot tell you.
Q Well, is that your best estimate?
A That I don't know.
Q Now, when you woke up what is the first thing you heard?
A I heard loud talking, first I heard loud talking and I put my head over Laura's shoulder and I saw a gun in Jerry's hand and he shot.
30 Q You say this is the gun that was in Jerry's hand?
A Yes, sir.
Q How many lamps in that apartment that night?
A One in Joe's house.
Q What kind of a lamp was it?
A A small hall lamp.
Q Where was it?
A On the stove when I seen it.
40 Q On the stove?

State's Witness, Louise Waldron, Cross

A On the stove and then they put it out on the table.

Q There was no lamp in the bedroom, was there?

A No, sir.

Q Dark in the bedroom, wasn't it?

A Yes, sir.

10

Q Now, have you seen this gun before that you picked out here?

A Yes.

Q Where did you see it?

A In Jerry's.

Q Where did you see it?

A In his hand, he carried it in his pocket.

Q Did you see it in his house?

A In the house.

Q Did you have a gun that you parked there that afternoon at Jerry's house?

20

A No, sir, I never had a gun in my life. I wouldn't know how to use it.

Q Do you know what an automatic gun is?

A No, sir.

Q In't it a fact that you brought a gun there and left it on Jerry's bureau that afternoon?

A No, sir, not me.

Q Well, who did?

A I don't know.

30

Q Where was Tamburro seated when you first got up and heard this quarrel?

A I don't know, I didn't see him, he was on the floor when I got out of bed.

Q Where was Joe Caputo?

A He was in the bedroom.

Q He was in the bedroom when?

A When the shooting was oging on.

Q Where did you first see Joe Caputo when you woke up?

40

State's Witness, Louise Waldron, Cross

A In the bedroom.

Q Whereabouts in the bedroom?

A Behind the trunk.

Q At that time a shot had been fired.

A I heard one from Jerry.

10 Q At that time when you saw Joe Caputo at the trunk in the bedroom had any shots been fired?

A Yes.

Q How many?

A I heard two more.

Q How many shots had been fired?

A Three altogether from Jerry and two from Joe Caputo who picked up his gun.

20 Q Now, won't you listen to my question, please. At the time that you saw Joe Caputo in the bedroom at the trunk had any shots been fired?

A Yes, by Jerry, while Joe was going down to get the gun out of his trunk.

Q How many shots were fired by Jerry?

A Three altogether.

Q And you saw all that lying in that bed over next to the wall?

A I didn't see the three shots but I heard them, I only saw one from Jerry's and I saw three from Joe.

30 Q You say you did not see three shots that you say Jerry shot?

A Yes, only one.

Q Where was Caputo when the shot was fired?

A I can't tell you.

Q Why?

A Because I don't know, I was laying down and I did not see where he was.

Q You were laying down in bed but you could see Jerry fire his first shot, is that right?

40 A Yes, sir.

Q Could you see Jerry fire the other two shots?

State's Witness, Louise Waldron, Cross

A No, sir.

Q Why not?

A Because I was laying back on Laura and I couldn't see of him.

Q Did you see Caputo fire any shots?

A Yes, three.

Q How many shots did you hear altogether? 10

A Six.

Q Do you know whether you heard any more than that?

A No, sir.

Q Are you sure that you heard six?

A That's all I heard.

Q Do you know how many you heard?

A Six.

Q Didn't you tell me in this testimony that you don't know how many shots he fired? 20

A Six altogether.

Q Didn't you tell me in this testimony that you don't know how many shots were fired?

A I didn't, I said six.

Q Did you see the gun that Jerry had in his hand?

A Yes, sir.

Q What kind was it?

A A small dark gun.

Q Do you see it lying around here? 30

A I saw it before, it is over in that man's hand.

Q Come down here and look at these guns and tell me which one Jerry had?

A There it is, it is all apart now.

Q Which one, is that the one?

A Yes, sir.

Q Did you see the one that Joe had in his hand?

A No, sir.

Q Do you know whether it was a big gun or a small one? 40

State's Witness, Louise Waldron, Cross

A No, sir, I can't tell you.

Q How near to you was Joe when he fired the gun?

A I really can't tell you.

Q Why not?

10 A Because I can't tell you.

Q But Joe was in the bedroom when he fired the gun, wasn't he?

A He was, but I can't tell you how far.

Q Was he right next to you?

A No, sir.

Q Well, he was nearer to you than Jerry was?

A I just don't know how far he was to me.

Q Was he nearer to you than Jerry?

A That I can't tell you.

20 Q Look at the diagram, you said Jerry was standing down here at this door, is that right?

A Yes, sir.

Q And the bed is over here?

A Yes, sir.

Q Now, where was Caputo standing?

A Over there by the trunk.

Q So that Caputo was at the foot of the bed that you were lying in?

A Yes, sir.

30 Q And Jerry was out in the other room, wasn't he?

A Yes, sir.

Q Now, when Caputo fired did he stay near the trunk or did he walk near the door?

A He just stayed at the trunk all the time that I saw him.

Q And he fired three shots from there, did he?

A Yes, sir.

Q Did you see Tamburro there?

A Yes, sir.

40 Q Isn't it a fact that when Joe got a gun he walked through this doorway that is marked there, I think C2, and fired from there, isn't that right?

State's Witness, Louise Waldron, Re-direct

A I wouldn't say.

Q Isn't it a fact that Joe Caputo got his gun and he walked to this point, the point marked C2 and fired the shots?

A I didn't see him walk there, he stayed by the bed, by the trunk.

10

REDIRECT EXAMINATION By Mr. Bozza.

Q You say you saw Jerry with this gun before the night of the shooting?

A No, sir.

Q You say he had a gun in his pocket and in the room, which gun do you mean?

A A small gun.

Q This one here?

A This must be the one, yes—no, that is not the one.

20

Q How many guns did you see in Jerry's apartment while you were cleaning there, if any?

A Two, one small one and one large one, and both the same style to me.

Q I show you four guns, three revolvers and a magazine and ask you during the time that you have been cleaning there at any time whether you saw them in the defendant Treficant's pocket or in the house, which guns if any did you see there?

A With who?

Q Jerry Treficanto.

30

A I saw one like that carried in his pocket.

MR. WACHENFELD. Is that the one that is marked in evidence?

MR. BOZZA. Yes.

Q And did you see any others?

A And a large one, a little bit larger than that.

Q Do you see it here?

A No, sir, they were both of the same color, dark.

40

State's Witness, Joseph Farrell, Direct

Q Did you see any catridges in any box?

A No, sir.

Q The only one you saw was this one here, (S12), and a larger one that you do not see here, is that right?

10 A A little larger.

Q Did you ever own any one of these guns?

A No, sir.

Q Did you ever make a present of a gun to Treficanto?

A No.

Q Did you ever buy any cartridges for him?

A No.

Q Did you ever go there with any cartridges?

A No, sir.

20 JOSEPH FARRELL sworn in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

Q You are a member of the Newark Police Department, connected with the Fourth Precinct?

A I am.

Q On the night of March 10, 1928, were you on duty?

A Yes.

Q Where?

30 A Well, I was up—I was on the wagon that night and officer Wittick and myself, we took a drunk up to the hospital, and on the way down I got off the wagon at South Orange Avenue and Bergen street. I walked down South Orange Avenue and when I got near Jones street, I saw Officer Jaeger following a man which we found later to be Gerardo Treficanto.

Q Is he in court?

A Yes.

Q Point him out.

40 A Right there.

Q That means nothing.

State's Witness, Joseph Farrell, Direct

MR. SIMANDL. Stand up.

Q That is the man?

A Yes.

Q Was he placed under arrest?

A Yes.

Q Was he searched?

A Yes.

10

Q What did you find on his person?

A A 32 calibre revolver, fully loaded.

Q Anything else?

A And a knife. The revolver was taken out of his right hand overcoat pocket and the knife was taken out of his left hand overcoat pocket.

Q Was the revolver empty or loaded?

A It was fully loaded.

Q I show you a gun, a revolver, and ask you if that is the revolver that you found on the person of Treficanto when you took him in custody that night?

20

A That was the gun. Officer Jaeger took it from his overcoat pocket.

Q Was it marked for identification?

A Yes.

Q Where? Is that a 38 calibre revolver?

A 32.

Q Now, I show you some bullets and ask you if these are the bullets that were in that revolver and if they were marked?

30

A Yes.

Q What mark was made upon them?

A I do not know, Officer Jaeger made it.

MR. WACHENFELD. I do not care, if he says those are the bullets.

(Gun offered in evidence and market Exhibit S-13.)

40

State's Witness, Joseph Farrell, Direct

(Bullets offered in evidence and marked Exhibit S-14.)

Q What part of his person did this come from?

A That come from his left hand overcoat pocket.

10 Q Both the knife and sheath?

A Yes.

MR. WACHENFELD. Objected to as immaterial and incompetent, and having no hearing.

THE COURT. Overruled.

Defendant Treficanto's counsel prays an exception to this ruling of the Court.

20 Exception allowed; let it be sealed and it is signed and sealed accordingly.

JUDGE.

(Knife offered in evidence and marked Exhibit S-15.)

Q Now, after you took him in custody, where did you bring him?

30 A Officer Jaeger and myself, we hailed a yellow independent cab, and we brought him to the fourth precinct, where he was slated.

Q Did you converse with him at any time when you had him in charge about this case?

A No.

THE COURT. What date was that?

WITNESS. This was on the night of March 10.

Q And what time was it?

40 A About eleven o'clock.

State's Witness, Joseph Farrell, Cross

CROSS EXAMINATION by Mr. Wachenfeld.

Q Where did you arrest Treficanto?

A At the corner of South Orange avenue and Norfolk street.

Q And you made the search right there before you took him to the station house? 10

A Yes.

Q And that is where you found the gun?

A Yes.

Q Now, at the time you found this gun on Treficanto, it was fully loaded?

A Yes.

Q Well oiled?

A Yes. 20

Q Any evidences of having been exploded within a recent period of time from the time that you took it from the defendant?

A No.

Q Blood on it?

A Well, there was a little blood on it.

Q Where, on what part of the gun?

A On the muzzle.

REDIRECT EXAMINATION by Mr. Bozza. 30

Q Now, officer, after you brought the defendant Treficanto to the fourth precinct, did you go to premises 72 Hayes street?

A No, sir. I was not in that house at all that night.

Q Did you go the next day?

A No.

Q You did not go there at any time?

A No. 40

State's Witness, William Jaeger, Direct

WILLIAM JAEGER recalled in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

10 Q Officer, on March 10, 1928, in the evening thereof, did you go to premises 72 Hayes street?

A I did.

Q for what purpose?

A I was informed there was a shooting match there.

Q And what did you do and what did you see when you got there?

20 A I was informed, and I went right over, that was about a quarter to eleven. I got in the house and I seen two women there, Mary Brennan, and Laura Smith and Joseph Caputo, and I asked them what happened, and they told me there was an argument there.

MR. WACHENFELD. I object.

THE COURT. Sustained. I will admit it as far as the defendant Caputo was concerned, anything he said.

Q What did the defendant Caputo say?

30 A He told me there had been an argument there between him and another man who had went out the front door and I seen this Tamburro lying on the floor. He was still living.

Q And did you speak to him or did he speak to you?

A He could not speak.

Q Did you make a search of Caputo's premises?

A I looked it over and went out and immediately searched for the man who had left.

40 Q At that time, upon your arrival at 72 Hayes street, after you spoke to Caputo, did you make a

States' Witness, William Jaeger, Direct

search of Caputo's room to find anything?

A I left Officer England in charge.

Q Where did you go?

A I went out in front and in front there was a crowd of people and they told me this man went north on Hayes street.

10

MR. WACHENFELD. I object.

THE COURT. Sustained.

Q As a result of what you heard, you went where?

A South Orange avenue and Norfolk street.

Q Did you see anything there?

A I overtook this man here.

Q Which man?

A Jerry Treficanto.

20

Q What did you do?

A I grabbed him and gave him a frisk and found a gun.

Q And by a frisk you mean what?

A I searched him.

Q And after you searched him, what did you find?

A I found a revolver in his right hand pocket and a knife in his left hand pocket.

Q I show you Exhibit S-13, S-14 and S-15, consisting of a revolver, five lead bullets and a knife and ask you if those were in the person and on the person of Treficanto?

30

A That is the revolver.

Q Did you make any mark of identification upon it?

A (Witness indicates pointing under the barrel above the trigger.) Two file marks.

Q You made that personally?

A Personally.

40

States' Witness, William Jaeger, Direct

Q I show you Exhibit S-14, consisting of five lead bullets and I ask you if you marked those for identification. (Witness indicates). Pointing to two parallel marks on each bullet. Now, did you also find Exhibit S-15 on his person?

10 A In his left hand overcoat pocket. There was no mark put on there.

Q You found it with the sheath?

A With the sheath.

Q Just as it is now?

A Just as it is.

Q Now, then, after you took the defendant Treficanto into custody, what, if anything, did you do with him?

20 A Took him to the Fourth Precinct, where he was slated, and then he was sent to the City Hospital for a wound on his head.

Q Did you go back to the premises 72 Hayes street?

A I did.

Q Did you find England there?

A No, Officer Shalk was in charge.

Q And did you with Officer Shalk make an investigation at both apartments?

A Shalk had already done that with headquarters men.

30

CROSS EXAMINATION by Mr. Wachenfeld.

Q Treficanto was injured when you arrested him?

A He was.

Q Where was his injury?

A On the top of his head.

Q Also on the side?

A I didn't notice. He was covered with blood.

40

Q Covered with blood, and could you tell how

State's Witness, William Jaeger, Cross

many injuries the blod was coming from on his head?

A I could not.

Q Did you examine the injuries at all?

A No.

Q But you sent him to the city hospital?

A I didn't send him. He was sent from the precinct. 10

Q Well, he was sent by the police authorities to the City Hospital for treatment for the injuries he had on his head?

A Yes.

Q Then you say he was covered with blood?

A Yes.

REDIRECT EXAMINATION by Mr. Bozza.

20

Q Did he say how he sustained those injuries?

A No, he did not.

Q Did you examine the injuries?

A No.

Q You just saw his head bleeding?

A I just saw his head bleeding.

Q Did you see his head at the point where it was bleeding?

A Why, it looked to me to be in the center of the top part of his head. 30

Q And did you look at it?

A Just glanced at it.

Q From what you saw of the wound, might it have been caused by a stray bullet?

A I could not tell.

CROSS EXAMINATION by Mr. Simandl.

Q These two young boys that you saw, they were the ones who informed you to go there? 40

State's Witness, Frederick Schalk, Direct

A Yes.

Q Did they tell you where they had been? Yes or no?

A They were out in front of the place.

Q When you saw them?

10 A No. They come and got us.

FREDERICK SCHALK recalled in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

Q You testified before that you came to the premises 72 Hayes street and stayed there that night until the following morning?

A Yes.

20 Q Now, did you make an inspection or search of Treficanto's apartment and Caputo's apartment?

A Yes.

Q And what search did you make of Treficanto's apartment?

30 A In Treficanto's apartment we looked over a bureau drawer— a bureau, rather, and we opened the second drawer from the top and there was Detective Harris from headquarters with me at the time, and I found a box of bullets. I turned them over to Detective Harris and I seen Detective Harris pick up an automatic gun, but I do not know just what make. I just got a glance of it, and he picked a revolver out of the second drawer where part of the bullets were, and in Treficanto's apartment, I also, after the bed was neatly made—

MR. WACHENFELD. Just a minute. You have not been asked any question.

THE COURT. Yes, he was asked what he found.

40

State's Witness, Frederick Schalk, Direct

WITNESS. Yes, what I found.

MR. WACHENFELD. I object to it as incompetent.

THE COURT. I will allow it.

Counsel for defendant Treficanto prays an exception to this ruling of the Court. 10

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,

Judge.

Q Proceed.

A I picked the blanket off the top of the bed and there was a white sheet next and I seen quite a few blood spots on this white sheet, and I pulled that back and there was another blanket there and I looked under the mattress and under the head of the mattress I found an axe. That is all I found in Treficanto's apartment. 20

MR. WACHENFELD. I move that that portion be stricken out.

THE COURT. Well, I do not see that the axe has much to do with it. 30

MR. BOZZA. All right. I consent that that be stricken out.

THE COURT. You say you saw the other officer get a revolver out of the second drawer?

WITNESS. Out of the second drawer in Treficanto's apartment. That is the apartment to the right. I do not know the man by sight. 40

State's Witness, Frederick Schalk, Cross

THE COURT. That is the same drawer that you found the cartridges in?

WITNESS. Yes.

CROSS EXAMINATION by Mr. Wachenfeld.

10

Q You mean as you walk in or facing the street?

A No, there is a kitchen and a bedroom.

Q You say you are speaking of the apartment on the right—

A Yes, not the apartment I first came in, but when I went in I was in that one first, and the one I mean we found these things in was on the right.

20

Q Now, as you walk in, which one are you speaking of?

A The one on my right, not where the body of the dead man was found.

REDIRECT EXAMINATION by Mr. Bozza.

Q Now, then, I show you an automatic magazine and a box of cartridges and I ask you if that is the magazine and the automatic and the cartridges that you saw?

30

A Well, I seen the automatic at a glance. That is just what I stated, and that is all I know about the automatic, and the revolver I had also seen at a glance.

Q What was the color of the box of cartridges, red or green?

A That I can slightly—I cannot recall exactly what the color of the box was, because I turned it right over to Detective Harris.

40

Q I show you Exhibit S-12 and ask you if that

State's Witness, Frederick Schalk, Cross

looks like the gun that was found in Treficanto's apartment?

A Well, I did not get a good enough look to identify it to be sure of the identification.

Q Well, was any mark of identification placed upon the gun?

A From my knowledge, I do not know. Detective Harris took care of everything. 10

Q Can you tell me whether the box of cartridges you saw was red or green?

A That I am not positive. I seen them marked by Officer Harris, Now, the color of the box I could not tell.

Q But it had an X mark for identification?

A It seemed to be like a 32 calibre bullet when I opened the box.

Q Was anything found in Caputo's apartment? 20

A I found a 22 calibre on the bed and that I immediately turned over to Officer England. I did not examine it.

Q I show you a revolver and ask you if that is the revolver you found on the bed in Caputo's apartment?

A On the bed?

Q Yes. Where did you find it?

A We found it on the bed.

Q I show you a revolver and ask you if that is the revolver you found? 30

A There is no need of my saying that, because I immediately turned it over.

THE COURT. Just say so.

WITNESS. That I don't know.

Q You found a gun and turned it over to England?

A Yes. 40

State's Witness, Frederick Schalk, Cross

CROSS EXAMINATION by Mr. Wachenfeld.

Q The gun, as I understand it, that you say you found in Caputo's apartment on the bed?

A Yes.

10 Q And that was a 22?

A Yes.

REDIRECT EXAMINATION by Mr. Bozza.

Q Did you open the gun and look at the appearance to ascertain what caliber it was?

A No, sir, Officer England took care of that.

20 Q Then you do not know what calibre it was if you cannot identify the revolver.

MR. WACHENFELD. I object to that as attempting to impeach his own witness.

THE COURT. Well, you looked at it close enough to tell.

WITNESS. To my knowledge it looked like a 22 revolver to me.

Q Do you carry a gun?

30 A Yes.

Q What is the calibre of your gun?

A 38.

CROSS EXAMINATION by Mr. Simandl.

Q Did you examine the gun at all that you found in Caputo's apartment?

A I did not unlock it, but I looked at it and it was a light nickel gun. It looked like a 22 calibre to me. That is all I know.

40

State's Witness, Joseph Harris, Direct

JOSEPH HARRIS recalled in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

Q Officer Harris, did you in conjunction with Officer Shalk go into Treficanto's apartment and make a search?

10

A I did.

Q And what did your search consist of, and what did you find if anything?

A Our search consisted of searching a bureau drawer, a dresser drawer, rather the second drawer from the top.

MR. WACHENFELD. I object to what he found in Treficanto's apartment, because I cannot see what connection that has with the crime. The man had a right to have in his apartment one or ten guns and there is nothing to show they are connected with the crime and I object on that ground.

20

THE COURT. Overruled.

Counsel for defendant Treficanto prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

30

DALLAS FLANNAGAN,
Judge.

Q What did you find there?

A I found a 32 automatic gun.

MR. WACHENFELD. The same objection.

THE COURT. The same ruling.

A And a 32 calibre revolver.

THE COURT. What is the first?

40

State's Witness, Joseph Harris, Direct

WITNESS. 32 automatic.

Q And I show you an automatic 32 and a magazine accompanying it and I ask you if that is what you found in the second drawer of the bureau of Treficanto's apartment?

10 A Yes.

MR. WACHENFELD. The same objection.

THE COURT. The same ruling.

Q I show you a 22 calibre revolver, Exhibit S-12, and I ask you if you found that in the same drawer of the bureau in Treficanto's apartment?

A Yes.

Q Now, was that empty or loaded?

A It contained five empty shells and two loaded shells.

20 Q Now, did you mark the gun and the shells for identification?

A I did.

Q What mark did you place upon it?

A On the gun?

Q Yes.

A Two marks.

30 Q Point to the identification marks, please. On the muzzle of the gun, two parallel lines. And I show you five empty shells and two loaded bullets of 22 calibre and I ask you if that is all the bullets that came out of Exhibit S-12.

A Yes.

Q Did you place any mark of identification upon them?

A I did.

Q And point to the mark for identification?

A Two marks.

40 Q It consists of two parallel file marks on each shell?

State's Witness, Joseph Harris, Direct

A Each shell.

Q And are there any marks on the bullet itself?

A Yes, there are two marks.

Q Similar marks on the bullets?

A Yes.

10

MR. BOZZA. I offer the bullets in evidence.

MR. WACHENFELD. The same objection.

THE COURT. The same ruling.

(The same is received in evidence and marked Exhibit S-16).

Q Now, did you find cartridges in Treficanto's house?

A No, sir, Patrolman Schalk found the cartridges.

20

THE COURT. Were you there when he found them?

WITNESS. Yes, sir.

Q Was there one or two boxes, and if so, of what color?

A There were two boxes, one red and one green.

Q I show you a red box and a green box containing 32 calibre bullets in each and ask you if those are the bullets that you saw in Treficanto's apartment?

30

MR. WACHENFELD. The same objection.

THE COURT. The same ruling.

Defendant's counsel prays an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,

Judge.

40

State's Witness, Joseph Harris, Direct

A Yes, sir.

Q Was any identification mark placed upon them?

A Yes, sir.

Q By whom?

10 A By Detective James McConnell.

Q Will you point to them, please?

A J. M. Mc.

Q J. M. Mc. on each box?

A J. M. Mc.

MR. BOZZA. I offer a box containing the loaded 32 calibre cartridges in evidence.

20 MR. WACHENFELD. I object on the ground that I have already mentioned and I object further on the ground that they have not been proven.

MR. SIMANDL. And I object to them on the ground that they are no part of the Caputo case and are not binding on him.

THE COURT. They are not admitted against Caputo. In what particular have they not been identified, Mr. Wachenfeld?

30 MR. WACHENFELD. We have no proof about the contents of them.

THE COURT. He said he marked them and I will admit that.

MR. WACHENFELD. They may have been filled or refilled, for all I know.

THE COURT. But you can cross examine him on that.

40 MR. WACHENFELD. I don't care to, your Honor.

State's Witness, Joseph Harris, Direct

THE COURT. I will admit them.

Defendant's counsel prays an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

10

DALLAS FLANNAGAN,
Judge.

(The same are received in evidence and marked Ex. S-17.)

MR. SIMANDL. These various exhibits found on Treficanto at the time he was arrested are not anywhere binding on Caputo.

THE COURT. Not at all, and the jury will so understand.

20

MR. BOZZA. I offer the automatic and the magazine of the automatic as one exhibit, if your Honor please.

(The same is received in evidence and marked Ex S-18).

Q Now, Officer, I show you the magazine of the automatic pistol and ask you to extract a bullet therefrom and tell me what calibre bullet it is?

30

A 32 calibre.

Q And is that a steel jacketed bullet?

A It is.

Q Is that the bullet of an automatic such as this?

A Yes, sir, it is.

Q Now, then, I show you a box marked Ex. S-17, containing 32 calibre steel jacketed bullets, and ask you if those bullets in this box are bullets for that magazine?

40

State's Witness, Joseph Harris, Direct

MR. WACHENFELD. I object to that as wholly immaterial and of no effect.

THE COURT. Overruled.

10 Defendant's counsel prays an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge,

MR. SIMANDL. And I object to it as Caputo and not binding on him.

20 THE COURT. The jury will understand it is not binding on Caputo.

A They are.

Q Now, then, when the magazine of the automatic was extracted was there any bullet or bullets missing from the magazine?

MR. WACHENFELD. I object to that as wholly immaterial.

THE COURT. I will allow it.

30 Defendant's counsel prays an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

A There were seven loaded bullets in the magazine, which filled the magazine.

40 Q And when the magazine is filled does it leave a bullet in the automatic itself?

State's Witness, Joseph Harris, Direct

A It leaves one in the chamber, that would be eight all told.

Q Now, that bullet that you found in the automatic itself was a discharged bullet, a shell, or was it a complete bullet?

A There was no bullet in the barrel, there were seven bullets in the chamber and the barrel was empty. 10

Q That indicated what?

MR. WACHENFELD. I object to that.

THE COURT. Sustained.

Q Your experience with fire arms—

THE COURT. Excuse me, if he understands the operation of the gun let him explain it. 20

Q Please explain the operation of an automatic.

MR. WACHENFELD. I object to that as immaterial.

A I am not very familiar with it.

THE COURT. He says he is not familiar with it, so it is ended.

Q Now, officer, I show you Exhibit S-11— 30

MR. WACHENFELD. What is Ex. S-11, Mr. Prosecutor?

MR. BOZZA. S-11 is a steel jacketed bullet, a discharged steel jacketed bullet.

MR. WACHENFELD. Where did it come from?

MR. BOZZA. That is the one Dr. Martland testified was taken out of the body of the deceased. 40

State's Witness, Joseph Harris, Cross

Q I show you Ex. S-11 consisting of the slug of a steel jacketed bullet and ask you if that bullet is fired by a 32 calibre automatic?

10 MR. WACHENFELD. I object to that, if your Honor please. He has not shown any qualifications, and it has already been testified to by Dr. Martland, without any objection, that it comes from a 32 calibre gun, and your witness is not qualified so far.

CROSS EXAMINATION by Mr. Wachenfeld.

Q Officer, this S-12, which is the gun there on your left, you say you found that?

A Yes, sir.

Q Where?

20 A In the bureau drawer in Treficanto's apartment.

Q And you found that shortly after you got there?

A Possibly ten minutes.

Q Was there evidence of it having been fired recently?

A Not that I know of.

Q Did you look at it for that purpose?

30 A Well, I did. There is five empty shells, discharged, and that is the only evidence of it being fired.

Q Well, if you fire five shells in an automatic and don't clean it up is there any evidence of the smoke and soot that will collect on it?

A Yes, sir, there is.

Q Did you notice any such smoke and soot on this gun?

A No, I did not.

Q Did you make an examination of it?

40 A I did.

State's Witness, Joseph Harris, Cross

Q Did you find any other 32 calibre revolver around this apartment?

A I did not.

Q Didn't you and the other officers testify that he found a 22 in Caputo's bedroom?

A Yes, sir.

Q Did you see any such revolver around there? 10

A I did not.

Q Did you see any such revolver that the officer testified to, Officer Schalk?

A I did.

Q Did you see that revolver?

A I did.

Q Where was that 22 revolver found?

A I don't know exactly.

Q Did you find any in Caputo's apartment? It was found in Caputo's apartment, wasn't? 20

A I was told so.

Q It was found by the police, wasn't it?

A I was told so.

Q Where is it?

A I don't know.

Q Referring to Ex. S-13 is that a 22 or a 32?

A A 32.

Q And this Colt is a 22, even a little school boy would know the difference by looking at that, wouldn't he, he would not have to be a police officer— 30

MR. BOZZA. I object to that.

THE COURT. Yes, it doesn't make any difference what a school boy might know. It is obvious.

Q It is quite obvious, isn't it, Officer?

A Yes, sir.

Q But you don't know what became of the 40

State's Witness, Joseph Harris, Cross

other 22 gun that was found in Caputo's apartment, do you?

A I saw it in the Fourth Precinct laying on the desk and I was told there was a gun found in Caputo's apartment.

10 MR. SIMANDL. I move to strike it out.

THE COURT. Strike it out.

Q But the gun that you saw at the Fourth Precinct was not S-12, was it?

A No, sir.

Q And you don't know where that gun went to, do you?

A No, I do not know.

20 JOHN ENGLAND recalled in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

Q Officer England, you told us that you had been to 72 Hayes street the night of March 10, 1928?

A Yes, sir.

Q Did you make a search of Caputo's apartment?

30 A Yes, sir.

Q And what did your search consist of and what did you find?

A I found a revolver, a 32, on the pillow in the bedroom.

Q And what was the calibre of the revolver that you found in Caputo's bed?

A 32 calibre.

Q I show you a revolver and ask you if that is the revolver that you found in Caputo's bed?

40 A Yes.

State's Witness, John England, Direct

Q Did you make any mark of identification on it?

A Yes, sir.

Q What did your mark consist of?

A Three marks on the gun.

Q Three fine marks on the muzzle?

A Yes, sir. 10

Q And was the gun loaded or unloaded?

A Loaded.

Q How many chambers were in that gun?

A Six.

Q How many loaded bullets did you find in that gun?

A Five.

Q Now, I show you five lead bullets, 32 calibre, and ask you if they came from the gun that you found in Caputo's bed? 20

A Yes, sir.

MR. BOZZA. I offer the gun and the bullets in evidence.

MR. WACHENFELD. I object to them.

MR. SIMANDL. I would like to cross examine first.

THE COURT. Do you want to cross examine particularly with reference to the gun or general cross? 30

MR. SIMANDL. Yes, your Honor.

(The gun is marked S-19 for identification.)

(The bullets are marked S-20 for identification.)

CROSS EXAMINATION By Mr. Simandl.

- Q Is that all you found in it (referring to Ex. S-19.)?
- A Yes, sir, that's all.
- 10 Q Officer, do you know the difference between
a 22 and a 32?
- A Yes, sir.
- Q What do you carry?
- A A 38.
- Q There isn't much difficulty in telling the difference between a 22 and a 32, is there?
- A No, sir.
- Q Did you find any other guns in Caputo's apartment besides this?
- 20 A No, sir.
- Q Did you see any others found there?
- A No, sir.
- Q Do you know whether there was another 22 found in Caputo's apartment which has not yet been offered in evidence?
- A No, sir.
- Q You didn't see it, did you?
- A No, sir.
- Q What precinct are you in?
- A Fourth.
- 30 Q Did you see that gun up in the fourth precinct laying around any place, that 22, that was taken in Caputo's apartment that was not produced here?
- A No, sir.
- Q Where did you find this in Caputo's apartment.
- A On a pillow in the bedroom.
- Q You were in that bedroom first?
- A Yes, sir.
- 40 Q Sure about that?

State's Witness, John England, Cross

A Yes, sir.

Q Where did these other officers pick up this 22, before or after you picked up the 32?

A When I stayed there on guard to keep this man and the woman from escaping, I saw the gun there.

Q When did the other officers come in there, before or after? 10

A After.

Q And you were in there when they were all in there?

A All of them.

Q How many police officers went into that room within the hour or two hours afterwards?

A I don't know, I left there two hours after.

Q In other words, there wasn't any other man asking your permission to get into that room? 20

A They couldn't get in.

Q In other words, headquarters men could not walk in there without your permission?

A Not unless I knew who it was.

Q You knew Detective Harris from the headquarters, do you?

A Yes, sir.

Q Do you mean to say that when he got to the scene of this alleged crime he would ask you permission to make an examination of that room? 30

A No, he would not.

Q He would rather brush you aside, wouldn't he, and do what he pleased in the room?

A Yes, sir.

THE COURT. What did you do with this gun when you got it?

WITNESS. I turned it over to Sergeant Frome.

40

State's Witness, John England, Cross

THE COURT. What precinct?

WITNESS. Fourth precinct.

THE COURT. Did you see it lying on the desk at that place?

10 WITNESS. I came in later on to put my identification marks on it.

THE COURT. Where was it?

WITNESS. On the desk in the fourth precinct.

MR. SIMANDL. Did Schalk turn over a gun to you?

WITNESS. No.

20 BY MR. BOZZA.

Q Is that the gun that Scharlk first received?

MR. WACHENFELD. Objected to.

THE COURT. Sustained.

Q Did you take more than one gun from Caputo's apartment?

A No, sir.

30 Q That is the only gun you took?

A Yes, sir.

Q That is the only gun you found in Caputo's bedroom?

A That is the only gun that was found by me.

Q In Caputo's bed?

A By me.

40 MR. WACHENFELD. I object to it. It has not been proved who owned it or proved who had it.

State's Witness, John England, Cross

THE COURT. Is the gun offered in evidence?

MR. BOZZA. Yes, sir.

THE COURT. I will admit it.

Mr. Wachenfeld prays an exception to this ruling of the court. 10

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

THE COURT. Of course this gun is not binding on Treficanto and the jury will so understand it. 20

(Ex. S-19 for identification and Ex. S-20 for identification are marked Ex. S-19 and Ex. S-20 respectively.)

JOSEPH LINARDUCCI sworn in behalf of State.

DIRECT EXAMINATION By Mr. Bozza.

Q You are county detective with the rank of Lieutenant? 30

A I am.

Q And you are the head of the Homicide Squad of Essex County?

A I am.

Q And in your capacity of the homicide squad of Essex County, did you conduct an investigation of this case?

A I did.

Q Have you any experience with firearms?

A Yes. 40

State's Witness, Joseph Linarducci, Direct

Q How many years have you handled firearms?

A I have been in the prosecutor's office over eleven years.

Q Are you familiar with automatic guns and their operation?

A I am.

10 Q I show you Exhibit S-18 and the magazine and I ask you to tell this court and jury how this automatic pistol operates?

MR. WACHENFELD. I object on the ground it is incompetent and immaterial. There is no proof yet that it even did operate.

THE COURT. I do not see exactly the purpose of it, but it means no harm so far.

20 MR. BOZZA. Unless I can connect it up, I will agree to withdraw it.

THE COURT. Go ahead.

30 A When the automatic is loaded the magazine is loaded in this fashion. Then an extra shell is put in the chamber and when there is a shell in the chamber, the automatic—the pistol is cocked, ready for firing. When a shot is fired, there is a drawback of the carrier and the shell is ejected automatically, and then another shell is thrown into the chamber from the magazine. That is simultaneous with the firing of the shot in the chamber.

THE COURT. You mean it loads itself?

WITNESS. Loads itself automatically.

40 Q So if a magazine—if an automatic has a magazine in which there are seven bullets, would that indicate that one bullet is lacking in the magazine, in the automatic?

State's Witness, Joseph Linarducci, Direct

MR. WACHENFELD. It is perfectly elementary.

MR. BOZZA. Withdraw the question.

Q I show you Exhibit S-11, testified to as a 32 calibre steel jacketed bullet, and ask you if such a bullet could be fired from that magazine—that automatic, Exhibit S-18? 10

MR. WACHENFELD. Objected to as immaterial and incompetent.

THE COURT. I will allow it.

Counsel for defendant Treficanto prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly. 20

DALLAS FLANNAGAN,
Judge.

A That is ammunition manufactured purposely for automatic pistols, to be fired out of automatic pistols commonly known as steel jacketed bullets.

Q And I ask you if steel jacketed bullet S-11 could have been fired from that magazine, Exhibit S-18?

MR. WACHENFELD. I object to that, because it is in no way connected with this crime. 30

THE COURT. I will allow it.

Counsel for defendant Treficanto prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge. 40

State's Witness, Joseph Linarducci, Cross

A Yes, because it is of the same calibre.

THE COURT. The bullet you have in mind is a bullet testified to by Dr. Martland?

WITNESS. Yes.

10 THE COURT. And what is the capacity of that magazine?

WITNESS. The capacity of the magazine is seven bullets.

THE COURT. And one in the chamber?

WITNESS. One in the chamber. That makes the capacity of the pistol eight.

CROSS EXAMINATION My Mr. Wachenfeld.

20

Q Well, there is no necessity for having a full magazine because you have an automatic pistol; if you have two bullets in your magazine and you operate your magazine, it will go off?

A Yes.

Q You do not have to have a full chamber in order to have the automatic revolver operated?

A No.

30

Q And if I have an automatic revolver, and I discharged one shot eight years ago, and if I had not touched it, that one shell would have been taken from the gun in its automatic operation and seven left in the chamber?

A Taken from the chamber.

Q Yes, it is ejected from the gun?

A Yes.

Q And all you can tell is that the gun is not full?

40

A The magazine in this gun is full to capacity, now.

State's Witness, Joseph Linarducci, Cross

Q What bearing has that upon the fact as to when it was discharged then?

A None that I know of, no.

Q In other words, if you find instead of a magazine that was full you found a magazine with two bullets in, it would either mean a full magazine of bullets had not been put in, or if a full magazine of bullets had been put in, a number of them would either have been discharged or taken out.

10

A Right.

CROSS EXAMINATION By Mr. Simandl.

Q If there are seven in a magazine and there is one in the barrel and the one in the barrel is fired, that is immediately ejected, isn't it?

A Yes, the shell is.

Q And a full shell from a magazine jumps out into the barrel, doesn't it?

20

A That is correct.

Q So if there is one discharged there would only be six in the barrel, six in the magazine, one in the barrel, isn't that right?

A Yes, if you assume—

Q Wait a minute. I didn't assume anything. I asked you a question. Answer it.

A Yes, if there are seven bullets put in the magazine.

30

Q And one bullet in the barrel?

A In this particular gun, yes.

Q Now, if you fill it right up and you pull that and it shoots right after that, you would have a full one in the barrel, and six in the chamber, is that right?

A That is correct.

Q And there were seven in this chamber, weren't there?

A There are seven now.

40

MR. SIMANDL. I will withdraw that.

State's Witness, Joseph Cocozza, Direct

JOSEPH COCOZZA recalled in behalf of the State.

DIRECT EXAMINATION By Mr. Bozza.

10 Q You are a county detective connected with the homicide squad?

A I am.

Q And in your capacity as a detective in the homicide squad, did you go to the premises 72 Hayes street to make an investigation?

A I did.

Q Did you examine the premises in front of the building in the rear of 72 Hayes street?

A I did.

Q And what did you find there, if anything?

20 A I found a discharged shell on the little shed right outside in front of this window of Caputo's apartment.

Q And who was with you at the time you found this shell?

A Dr. Berardinelli was there, and he also found a discharged shell and turned it over to me.

Q And did you see him pick it up?

A I did.

Q And did you see where he picked it from? ?

A I did.

30 Q Kindly indicate where you saw him pick it from?

A He picked it closer to this toilet and I picked mine right out in front of that window there (indicating).

Q Now, these shells are what calibre bullet?

A 32 calibre automatic.

THE COURT. Are those the shells you picked up?

40 Q I show you two shells and ask you if these

State's Witness, Joseph Coccozza, Direct

are the two shells, one of which you found and one of which you say Dr. Berardinelli picked up in front of the premises?

A They are.

Q What calibre bullets are they?

A 32 calibre automatic shells.

Q Did you place any mark of identification?

10

A Yes, I marked them. Two lines on one indicating the one that Dr. Berardinelli picked up and the J-C. on the other indicating the one that I found.

Q I show you the lead of a bullet and ask you if you found that?

A I didn't find it. It was found by Officer Brinkman in the hallway at 72 Hayes street.

MR. WACHENFELD. Were you there when he found it? 20

WITNESS. No.

THE COURT. Strike it out.

Q Officer Brinkman turned it over to you?

A Turned over by headquarters men.

CROSS EXAMINATION By Mr. Wachenfeld.

Q When did you go there to make this investigation? 30

A 11:30 Saturday, March 10.

Q Did you find this bullet at night?

A Yes.

MR. WACHENFELD. I object to that as immaterial.

THE COURT. I will admit it.

Counsel for defendant Treficanto prays an 40

States' Witness, John Brinkman, Direct

exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

10

(Bullet offered in evidence and marked Exhibit S-21.)

JOHN BRINKMAN recalled in behalf of the State.

DIRECT EXAMINATION by Mr. Bozza.

20 Q I show you the lead of a bullet and ask you if you found that on the premises 72 Hayes street and, if so, exactly where.

A In between the two apartments, in the hall.

Q And that is the lead of what calibre bullet?

A 22.

MR. BOZZA. I offer it in evidence.

CROSS EXAMINATION by Mr. Wachenfeld.

Q Did you mark that, officer?

A No.

30 Q How do you know what it is?

A But I seen it marked.

Q Who marked it?

A One of the detectives.

Q Which one?

A I think it was Fischer or Harris.

Q What kind of a mark did he put on it?

A A file mark.

Q By just an ordinary scratch?

A No, he filed it with a file.

40 Q Well, there is nothing odd about that?

State's Witness, Ralph Capadonno, Direct

MR. BOZZA. I object. It is an identification mark, nevertheless.

MR. WACHENFELD. Go ahead, there is no use wasting time.

(Bullet offered in evidence and marked Exhibit S-22. 10

RAPHAEL CAPADONNO sworn in behalf of the State.

DIRECT EXAMINATION by Mr Bozza.

Q You are a member of the Newark Police Department connected with detective headquarters?

A Yes.

Q And were you assigned to the investigation of this case? 20

A I was.

Q And did you, in your investigation, converse with the defendants Treficanto and Caputo?

A I did.

Q When and where?

A On the afternoon of March 10, at police headquarters, in company with detective Coccozza of the Prosecutor's office.

Q And that was when with reference to the time of the crime, do you know? 30

A Well, that was the next day. That happened at night, and the following morning.

Q And who did you converse with first?

A First with Treficanto.

Q And what part of headquarters was it?

A On the third floor, in a little room off the detective bureau.

Q And who was present, if anyone, beside you and county detective Coccozza? 40

State's Witness, Ralph Capadonno, Direct

A Well, most of the time Detective Coccozza, with the exception when Harris and McConnell, who were in the adjoining room, would come in.

Q And did you speak to him in English or Italian?

10 A Italian mostly.

Q Did he make a complete continuous statement, or did he answer questions?

A He made a statement, a complete statement. We asked him just what happenel, and asked him to repeat it and also confronted him with the witnesses in the case.

Q So that you did not converse with him as the result of questions and answers? ?

20 A We asked him just to go ahead after talking to him, and to recite what happened that afternoon and night.

Q What did he tell you happened in his apartment that night?

MR. SIMANDL. Objected to on the ground that the statement is not binding on Caputo and certainly prejudicial.

THE COURT. It is not binding on Caputo.

30 MR. WACHENFELD. I object. It is in writing.

MR. BOZZA. Whatever statements Treficanto has made to these officers is not binding on the other defendant.

MR. SIMANDL. I know, but it certainly cannot wipe out the prejudice.

40 THE COURT. We do not know what is in it. It may be something very beneficial. Is there any other objection to the statement beside that?

State's Witness, Ralph Capadonno, Direct

MR. WACHENFELD. I have another objection. This is another one of the difficulties counsel has in which the interest of the respective defendants in this case are absolutely antagonistic and that there should have been a severance and my further objection, I think I should be permitted to cross examine first.

10

THE COURT. Go ahead.

CROSS EXAMINATION by Mr. Wachenfeld.

Q Everything Treficanto told you was taken down in a written statement and signed by him?

A Yes.

MR. WACHENFELD. Now, I object on the ground that everything is in writing and signed by the defendant and that is the best proof of what he said.

20

THE COURT. The witness says that everything that was said was put down in writing.

MR. BOZZA. The State will offer the statement in evidence before the State concludes its case, but it prefers at this time to prove from this officer what he heard from the lips of the defendant to be admissible in evidence.

30

THE COURT. Yes, but the testimony of the officer now is that everything that was said was reduced to writing and signed. Isn't that the best evidence?

MR. BOZZA. And I asked him to testify to his recollection.

THE COURT. I cannot have him go over it twice, the same thing, first verbally.

40

State's Witness, Ralph Capadonno, Direct

RE-DIRECT EXAMINATION by Mr. Bozza.

Q In what language was this statement written?

A In Italian.

10 Q And who did the writing?

A I did.

Q And who did the talking?

A I did, and Detective Cocozza.

Q Now, who translated the Italian—the statement from the Italian into English?

A I did.

Q Now, I show you what purports to be a statement and I ask you if that is the statement that was taken down by you in Italian?

20 MR. WACHENFELD. That is the original statement.

MR. BOZZA. The original statement.

A Yes, this is the original and this is the translation.

MR. WACHENFELD. Is it in handwriting or typewriting?

30 MR. BOZZA. The original is in pen and ink and handwriting and the translation is typewritten.

Q Now, turn to the original Italian statement. Did you see the defendant sign that statement?

A Yes, he signed it in my presence and Detective Cocozza's.

Q And did you witness that statement?

A I did.

Q Does your signature appear on that statement?

40 A It does.

State's Witness, Ralph Capadonno, Direct

Q Show us where?

A Under the signature of Joseph Coccozza on the second page and also on the fourth page.

Q Now, do you understand Italian?

A I do.

Q Do you read and write it?

A I do.

10

MR. WACHENFELD. I will admit his qualifications.

MR. BOZZA. I offer the statement in evidence and beg leave to read it into the record and to the jury.

MR. SIMANDL. I object on the ground it is entirely prejudicial against Caputo. It has no binding force against him. It can do nothing but prejudice him.

20

THE COURT. The jury are instructed that the statement is not binding on Caputo.

Do you wish to cross examine, Mr. Wachenfeld?

CROSS EXAMINATION by Mr. Wachenfeld.

Q You made no statement to this man as to what he should say?

A No, no promise. I asked him just to tell me what happened.

30

Q You had no difficulty?

A No trouble whatsoever.

Q You found he was perfectly willing to tell you what this statement contained?

A Yes.

Q It being a voluntary statement?

A Yes. He did not hesitate about it, and he also was confronted with the statement of the other defendant, Joseph Caputo.

40

State's Witness, Ralph Capadonno, Cross

Q And this translation attached to it is a perfect translation?

A Yes.

(Mr. Bozza reads Ex. S-23 to the jury.)

10 Q Whom did you speak to, if anyone, after you spoke to Treficanto?

A The other defendant, Joseph Caputo.

Q I show you what purports to be a statement of the defendant Joseph Caputo and ask you if you saw him sign that statement?

A He could not write so he made a cross.

Q And was his cross witnessed by you and by Coccozza?

A Detective Coccozza, yes.

20 Q And do your signatures appear at the left hand corner of the bottom of the statement?

A I made him write a cross and I wrote Joseph Caputo along side of it and his mark over and under the cross.

Q And was the same method of obtaining information pursued with Caputo as was pursued with Treficanto?

A Yes, sir.

Q And who wrote the statement in Italian?

A I did.

30 Q And who translated in English from the Italian?

A I did.

MR. BOZZA. I offer it in evidence.

BY MR. SIMANDL.

Q What did you do?

40 A First I talked with Treficanto and after talking with him I confronted both defendants with the witnesses, and Caputo denied shooting or making any shots and we asked him if he would make

State's Witness, Ralph Capadonno, Cross

a voluntary statement of what happened and I wrote it down as he told it to me.

Q Did you read it to him again?

A I did.

Q Did you ask him whether he could read or write?

A He said he could not read or write.

10

MR. WACHENFELD. I object to it on behalf of the other defendant.

THE COURT. The jury is instructed that this statement is not binding upon the other defendant and only binding on the defendant who made it.

(Same is received in evidence and marked S-24.)

(Same is read to the jury.)

20

MR. WACHENFELD. If your Honor please, I move to strike out that portion of that statement which is in the nature of a self serving declaration made on behalf of the other defendant whom I do not represent. There is statements in there by the other defendant as to what the deceased said prior to his death and statements of other things, nothing that can be conceived of except an admission or a declaration made in his favor, and yet it is put in as an exhibit against the other defendant and I move to strike it out.

30

THE COURT. I have already instructed the jury and I will reiterate that this statement is not binding, has no binding effect whatever upon anyone except the man who made it and as far as the other defendant is concerned it is to be disregarded. The motion to strike out is denied and an exception

40

State's Witness, Ralph Capadonno, Cross

granted.

Defendant's counsel prays an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

10

DALLAS FLANNAGAN,
Judge.

THE STATE RESTS

ADJOURNED to Wednesday, June 5, 1928,
at ten o'clock, A. M.

20

30

40

Motion for Verdict

ESSEX COUNTY COURT OF OYER AND
TERMINER.

Third Day

Wednesday, June 6, 1928.

10

STATE OF NEW JERSEY,

vs.

GERARDO TREFICANTO
and JOSEPH CAPUTO

On Indictment

No. 422 Apr.T.1928
for
Murder

Continued pursuant to adjournment.

Present, counsel as before stated.

20

(The following motion made before the jury entered the courtroom.

MR. SIMANDL. I desire at this time to make a motion for the direction of a verdict of not guilty as to Joseph Caputo on three grounds: 1, that there is no proof or not sufficient proof produced on the part of the State to prove the material allegations of the indictment as against him; 2, there is no proof that he in any wise was guilty of an unlawful act; 3, there is no proof that he in any wise aided or abetted, assisted or encouraged the principal actor in the commission of the offense;; 4, that there is no evidence to show, and it is admitted by the State that the defendant did not fire any shots which struck the deceased.

30

(Counsel argue.)

40

Motion for Verdict

THE COURT. I am impressed with the force of your point, but, however, I will deny your motion; but I will be very glad to entertain the point you made again at the close.

10 MR. SIMANDL. We formally rest, and I desire now to renew my motion for an acquittal.

THE COURT. Then I will reserve my decision on your motion.

MR. SIMANDL. Well, I am not going to participate in the case after this. There is no rebuttal.

20 THE COURT. Well, as far as I am concerned, I am reserving my decision.

MR. BOZZA. And will your Honor grant me the privilege of presenting some authorities?

THE COURT. Yes.

MR. SIMANDL. When may I sum up?

30 THE COURT. Well, you may sum up at the time that is usual, that is, after all the evidence is in.

MR. SIMANDL. Well, as far as my case is concerned, all the evidence is in.

THE COURT. Yes, but you will have to defer your summation.

(The jury enters the courtroom.)

40 MR. SIMANDL. I pray an exception, if your Honor please, to the denial of my motion.

Defendant's Witness, Allen O. Godfrey, Direct

Exception allowed; let it be sealed, and it is signed and sealed accordingly

DALLAS FLANNAGAN,
Judge.

MR. SIMANDL. I rest in behalf of the defendant Caputo, and I now renew my motion for the direction of a verdict of acquittal on the grounds already stated. 10

THE COURT. Very well. Decision reserved for the time being.

Mr. Wachenfeld opens for the defendant Gerardo Treficanto.

ALLEN O. GODFREY sworn in behalf of the defendant Treficanto. 20

DIRECT EXAMINATION by Mr. Wachenfeld.

Q Dr. Godfrey, you are connected with the City Hospital at Newark?

A I am.

Q And have been so for how long?

A Since the first of October, 1927.

Q And on the night of the 10th of March, do you remember treating at the hospital this man who is seated here, Gerardo Treficanto? 30

A On my records I have the 11th of March at 12:45 A. M.

Q What was the condition he was in at the time he got there and what did you treat him for?

A I found a three-inch laceration in the right parietal scalp and a "V" shape laceration in the occipital region in the back.

Q Now, the "V" shape wound, in your opinion, what was that caused by? 40

Defendant's Witness, Allen O. Godfrey, Cross

A In my opinion, it is similar to a great many lacerations we get caused by blunt instruments.

Q And, in your opinion, what was the lateral wound on the side of the head caused by?

10 A That also is similar to the ones we get a great many of.

Q What did you do for him?

A I took three sutures in each laceration.

Q And there was a considerable amount of blood?

A Yes, his hair was full of blood.

Q What was the condition of the man as to intoxication or sobriety?

20 A He had a marked alcoholic odor to the breath and he spoke very little. He held his head down and I could get nothing out of him.

Q He was brought there by the police officers?

A Yes, he was.

Q How long did you take to treat him?

A I should judge about twenty minutes or a half an hour.

Q And then he went back with the police officers?

A Yes.

Q He did not stay at the hospital?

30 A No, sir, he did not stay.

CROSS EXAMINATION by Mr. Bozza.

Q Now, that three-inch laceration on the side of the head, did that take an upward slope?

A We have had so many cases since, I do not recall.

Q Now, could that three-inch laceration on the side of the head be caused by a bullet grazing the head?

40 A I imagine it is possible.

Defendant's Witness, John Sylvestro, Direct

Q Now, could that "V" shape in the back of the head be caused by a fall?

A That is possible, also.

JOHN SYLVESTRO sworn in behalf of the defendant Gerardo Treficanto, through interpreter.

DIRECT EXAMINATION by Mr. Wachenfeld, through interpreter. 10

Q Where do you live?

A 73 Hayes street.

Q Do you know Gerardo Treficanto?

A Sure.

Q Do you know Joe Caputo?

A Yes.

Q How long have you known them?

A About two or three months? 20

Q On Saturday afternoon sometime, March 10, this year, did you see Gerardo Treficanto?

A Yes, on the sidewalk.

Q Did he have a conversation with you about Joe Caputo?

A Yes.

(Witness continues speaking in Italian, but the same is not interpreted.)

MR. BOZZA. I object. 30

THE COURT. Sustain the objection. I will allow the answer yes, but the details of the conversation no.

Counsel for defendant Treficanto prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN, 40
Judge.

Defendant's Witness, John Sylvestro, Direct

Q Did the defendant Treficanto at that time say anything to you about any difficulty that he had with the defendant Joseph Caputo?

MR. BOZZA. Yes or no.

A No.

10 Q Did he at that time tell you anything with reference to the woman who was working for him being in Caputo's apartment?

MR. BOZZA. I object.

THE COURT. Sustained.

Counsel for defendant Treficanto prays an exception to this ruling of the Court.

20 Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Q Did Treficanto at that time say anything to you about going to the police and making a complaint against the defendant Caputo?

MR. BOZZA. I object.

THE COURT. Sustained.

30 Counsel for defendant Treficanto prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Q Will you tell me everything that Treficanto said to you that afternoon?

40 MR. BOZZA. I object.

Defendant's Witness, John Sylvestro, Direct

THE COURT. Sustained.

Counsel for defendant Treficanto prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

10

DALLAS FLANNAGAN,
Judge.

Q After you had a conversation with Treficanto did you advise him not to make a complaint to the police department?

MR. BOZZA. I object.

THE COURT. Sustained.

Counsel for defendant Treficanto prays an exception to this ruling of the Court.

20

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Q After your conversation with Treficanto, where did you go with Treficanto?

A He came to my house.

Q He came to your house?

30

A To my house.

Q After he came to your house, then where did you and Treficanto go?

A No place.

Q Didn't you go to Caputo's apartment?

A Yes. I went there to give him a pipe that he had left at my house on the table.

Q What time in the afternoon was that?

A Six o'clock.

40

Defendant's Witness, John Sylvestro, Direct

Q Who was in Caputo's apartment at that time?

A Two women, Treficanto, Caputo and Tamburro.

Q What were they doing?

A They were sitting there talking to each other.

10 Q How long did you stay?

A Just one minutes.

Q And did you go back to Caputo's apartment again any time that day or night?

A No, I go to the show.

CROSS EXAMINATION waived.

GERARDO TREFICANTO, one of the defendants, sworn in his own behalf.

DIRECT EXAMINATION by Mr. Wachenfeld.

20 Q Jerry, how old are you?

A 54, I was born 1874, on the 20th of January.

Q Are you married?

A Yes, sir.

Q Where is your wife?

A She is dead.

Q How many children did you have?

A I had eleven and I got one now, there are ten dead.

30 Q When did you first meet Joe Caputo?

A On the 15th day of February in that house; it would have been a month March 15th.

Q How long had you been living at 72 Hayes street before March 10, 1928?

A Two years it would be the 15th day of May.

Q How long had you known this girl, Louisa Waldron?

A Four months.

Q What did she do for you?

40 A Wash my clothes and cleaned the house.

Q How often did she come to the house for

Defendants' Witness, Gerardo Treficanto, Direct

that purpose?

A Every two months she was there every day, November and December she would go home at eleven o'clock every night.

Q She was at your place on Saturday March 10th, was she for that same purpose? 10

A Yes, sir.

Q What time did she come there?

A Nine o'clock.

Q What did she do after she got there?

A She arrived there about half-past nine. I went out, and she began to clean the house.

Q Well, how long did she remain in your place?

A I went out at half-past nine and I returned at 12:05.

Q Did you bring anything with you at that time? 20

A No.

Q Where did you get the cooked fish that day?

A From Michael Bucino on Bank street.

Q What time of day did you get that?

A I didn't buy it; Michael Bucino gave it to me.

Q What time did you bring it home?

A When I went home the first time five minutes after 12 I talked about the fish and I said I would go back to Bank street to see if I could get some fish, I suppose it was 12:25. It was already cooked. 30

Q What time did the Waldron woman go over to Caputo's apartment?

A She had four or five pieces of that fish and then I lit my pipe and she went across the hall.

Q Did you go across the hall after her?

A About one o'clock.

Q And what happened when you got there?

A They were eating and drinking. 40

Defendants' Witness, Gerardo Treficanto, Direct

Q Well, did you speak to anybody when you went in there?

A No, only with this Louisa.

Q What did you say to Louisa?

10 A I made a mistake first, when I brought the fish I brought some meat from South Orange avenue. In one hand I was carrying the fish and in the other hand I was carrying the meat.

MR. BOZZA. Mr. Interpreter, do you mean you made the mistake or are you merely translating what he is telling you?

THE INTERPRETER. Yes.

Q What did you say to Louisa Waldron when you first went over to Joe Caputo's apartment?

20 A I said, "Please come over the house and cook."

Q What did she say?

A "Wait a minute."

Q What was she doing there?

A She was sitting there and drinking.

Q Were there any other women there at that time?

A Yes, sir.

Q How many?

30 A Two.

Q How many men were there?

A Joe Caputo and the man what died.

Q Did you ever know the man who died before that occasion?

A No, sir.

Q How long did you stay there?

A As I went in to call her I went out.

Q Didn't you have anything to drink there yourself?

40 A No, sir.

Defendants' Witness, Gerardo Treficanto, Direct

Q Did you come back again?

A Yes, sir.

Q How long after?

A Two o'clock.

Q Whom did you speak to then?

A Only to Louisa. To come there and cook.

Q Did you say something to her?

10

A Yes.

Q What did she tell you then?

A "Wait a minute."

Q Did you have anything to drink at that time?

A No, sir.

Q How long did you stay there?

A I did not stay there, I went out right away.

Q Well, did you go back again?

A After I went out to buy a hundred pounds
of coal.

20

Q Then did you come back to Caputo's apartment?

A At three o'clock.

Q Well, what happened when you got back there at three o'clock.

A I said, "Louisa, come over and cook." "One minute."

Q What did Louisa say then?

A The door was open and I went back to my home again, and I wanted her to come over and cook.

30

Q Well, did you go back to Caputo's apartment again?

A Yes—excuse me, I am going to give you the time I went in there.

Q Give us the time and tell us the story in your own way.

A I went out for a walk and then I returned at four o'clock and I went and called her again.

40

Defendants' Witness, Gerardo Treficanto, Direct

Q Well, what happened then, go on with your story.

10 A When I returned I thought that the meat was already cooked and I found it was not cooked so I went to call her again. Then I went to Michael Bucino and said, "I lost the boss." And he said, "What is the matter?" And I said, "She ran away."

THE COURT. Never mind what was said to Bucino.

Q What happened when you went back to Caputo's apartment?

A It was about five o'clock.

Q Then what happened?

20 A I went to call her again, Louisa Waldron.

Q Tell us what happened?

A I said, "Louisa, come over and cook." She said, "Fuck yourself, go to hell."

Q What did you do then?

A I heard her say, "Fuck yourself, go to hell," then I slapped her.

Q What did you do after that, did you stay there or go out?

A After I slapped Waldron Caputo got up and he said, "In my house I don't want you to do this."

30 Q What else did Caputo say?

A "I will not let you spill blood in my house?"

Q Well, then what happened?

A I said, "I am sorry, because you are drunk."

Q Well, what happened then?

A Then I went to my rooms and I took Louisa's coat and scarf and then I brought it over there.

Q Go ahead with the story and tell us what happened.

40 A When I went there I said, "Tell Joe Caputo to please put them out," and he said, "They are all

Defendants' Witness, Gerardo Treficanto, Direct

right in my house," and I said, "Goodbye."

Q Then what happened?

A Then I said, "Goodbye" and then I said to myself, "I will go to the police station and get an officer and have them all arrested."

Q Well, did you go to the police station?

A No, sir.

Q Well, what prevented you?

A I met Annello on the street and he asked me where I was going.

Q Is that the man who just testified on the stand before you?

A Yes, sir.

Q Go ahead and tell us what happened after you had the conversation with Ammello?

A (Not answered.)

Q After you went to Ammello's house, where did you go then?

THE COURT. You answer the question. He asked you what you did after you went to that house. Now, you tell us.

A After I was over to that house Joe Caputo came to that house also.

Q Well, what happened then?

MR. BOZZA. I object to the conversation. Counsel asked what happened and he is giving conversation.

THE COURT. Not the conversation.

Q Who was the conversation with?

A Between me and Caputo at Ammello's house.

MR. BOZZA. I object to that. It is wholly immaterial what was said by these defendants in somebody else's house.

THE COURT. Maybe not.

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Defendants' Witness, Gerardo Treficanto, Direct

A Caputo in Ammello's house said, "see what this fellow did; he came there and slapped a woman in my home."

THE COURT. Is that what Caputo said?

10 WITNESS. Yes. And then he was going to go and call the police officer.

Q What happened then?

A And then he said that if the police officer would come to my house he would never walk in this world anymore.

Q Who said that?

A Joseph Caputo.

THE COURT. Come to whose house?

20 WITNESS. Caputo's'.

Q What happened then?

A I answered him I didn't go and call the police, I would never go.

Q Go ahead. Go on with your story.

THE COURT. Is it the police officer who would never walk any more or who would never walk any more?

WITNESS. No, he referred that to me.

30 Q Go ahead. What happened then?

A I said I didn't go and call the police officer, and I didn't go, either.

Q Go ahead.

A Then I said to him, "I cannot talk to you this evening because you are drunk; I will talk to you tomorrow."

Q Go on and tell the story.

40 A Then he talked to Giovanni again. Then he said to Giovanni, "I have got three women over

Defendants' Witness, Gerardo Treficanto, Direct

to the house; do you want two of them?"

Q Go ahead.

A And Giovanni said, "What am I going to do with them?"

Q Then what?

A And he said, "If you don't believe me come to the house and I will show them to you."

10

Q Go ahead.

A Then the whole three of us, we went over to my home. I went in and I opened the door. Then Giovanni followed me and then Caputo followed me. Then I said to Giovanni, "see my woman that does the cleaning; she clean the house and clean the stove and everything, and now she left me," and I showed him the meat was on the table.

Q Go ahead.

20

A And Giovanni said, "Do you want to cook it?" and I said, "Well, let it go until tomorrow."

Q Go ahead, what happened after that?

A Then Giovanni and Ammello went into Caputo's house, and Caputo remained in my room.

Q Well, while Caputo remained in your room, did you and Caputo drink anything?

A No.

Q Well, did you go back to Caputo's room after that?

30

A Then Caputo said, "Gerardo, on account of the woman we going to kill each other?"

THE COURT. Who said this?

WITNESS. Caputo.

Q Where was that said? In your apartment or Caputo's apartment?

A In my apartment.

Q Well, then, what happened? Did you go

40

Defendants' Witness, Gerardo Treficanto, Direct

back to Caputo's apartment?

A And I said, "You have got her in your own house; I don't care anything about it. I do not want to know anything about it."

10 Q Well, then, did you go back to Caputo's house?

A And he answered this, "They are like the wind, today they are in my house, tomorrow they are in your house, and some other day they are in somebody else's house."

Q Did you go back to Caputo's home?

A Yes, Caputo said, "Come on over to my home; we will have a drink."

Q After you went back to Caputo's apartment what happened?

20 A I went over and there was wine on the table and I drank.

Q Did Caputo drink with you?

A Yes. That was his wine; that was his own house.

Q How long did you stay there?

A It was about seven o'clock. I drank three small glasses and two big glasses; five altogether.

Q Was there any trouble there at that time?

A Ammello was there also. No.

Q How long did you stay there?

30 A I went there about six o'clock and it was about seven o'clock.

Q Well, did you leave at seven o'clock?

A No, sir.

Q What happened after seven o'clock?

A The man that you say is dead, I don't know his name, he said the wine is all gone, and you will have to get another half gallon of wine."

Q Who said that? The man who is dead?

A The man who is dead.

40 Q Well, did you go out and get some wine?

A I told him I have no money three months

Defendants' Witness, Gerardo Treficanto, Direct

I am not working.

Q Well, what happened?

A Then, this man that died, he put his hand in his pocket and he puulled out a dollar and a quarter and wanted to give it to me and said, "Go ahead and buy half a gallon on wine."

Q Did you?

10

A Joe Caputo answered, "A half a gallon of wine costs a dollar and a half."

Q Well, did anybody get the half gallon of wine, and if so, who?

A The man that died put his hand in his pocket again and pulled out a quarter and gave it to Joe Caputo.

Q Then what happened?

A And then he said, "This is the last one I have." Joe Caputo kept the dollar and a half and went out for a half gallon of wine."

20

Q Well, what happened after he got back with the half gallon of wine?

A Louisa was on the deceased's arm and she fainted and fell.

MR. BOZZA. In the arms.

THE COURT. Louisa was in the deceased's arms and she what?

A She fell, she fainted and she fell, and her face struck my foot. 30

Q Go ahead.

A Then Joe Caputo came and when she fell she fell up against the door and when Caputo came in he could not come in, he couldn't open the door.

Q Well, what happened then?

A Then me and John who was here on the witness-stand and the other woman picked her up.

Q Whose bed did you put Louisa in?

40

Defendants' Witness, Gerardo Treficanto, Direct

A In Caputo's bed. They were in Caputo's house, they were not in my house.

Q Well, what happened then?

A Then, this New York woman she was drunk also and she was in bed.

10 Q Go ahead.

A And we started to drink.

Q Who?

A The whole four of us, me, Caputo, John and the man that died.

Q Well, how long did that last?

A Until half-past seven or eight o'clock.

Q Then what happened?

20 A Caputo said, "Gerardo, five persons cannot stay in one bed." You will have to take one of the woman over to your home," and I said, "If she wants to go to bed she can sleep there, because I do not stay in the house." And he said, "I am the boss, when I said they should go they must go. If she don't come I will hit her." I said, "I am going to Bank street," and he said, "All right," and then I went to my room and lit the gas and started to smoke. Then he brought in that Mary Brennan and she was calling for "Joe, Joe." And he threw her in my bed. Caputo said, "Shut u

30 and he left the woman in my room and went back to his room. He went back to get a jug of whisky and a glass. Then he came back into my room and he gave Mary Brennan a drink. Then he filled the glass and he gave me a drink and I told him I don't drink whiskey, and the glass with the whiskey in it was on the table. It was still there, and then Mary Brennan began to call, "Joe, Joe, Joe," for about five or six minutes and then I said, "He is the boss I will go and call him," and I went over to his room and I said, "Joe, come over and

40 get her, she cries, too much, because I am going

Defendants' Witness, Gerardo Treficanto, Direct

to Bank street." I said I was going to Bank street. He was drunk and he punched me here (indicating), and as I heard bang, bang, two shots. Then I fell on the floor, and as I did I pulled out my gun, the 22, and I shot twice on the floor. Then Mary Brennan came from my room, Caputo's room, and then as I got up from the floor I shot twice in the air. This is the kitchen door and here is where the bedroom is, and inside was Louisa Waldron and the man what died. Joe Caputo and the woman from New York was standing this way. This was one room, this is the bed and this is where Joe Caputo was, and this is where the woman from New York was, and as I came out of my house I went this way, I told Joe to come into the house to get her, she is making a fight, I got to go to Bank street, and as I stood there talking to him I got two shots as I was standing there and they were coming from inside (indicating toward the kitchen).

10

20

THE COURT. Tell the witness to speak in Italian.

A JUROR. Do I understand that the first four shots were shot in this defendant's room

MR. BOZZA. Not in this defendant's room now in Caputo's room.

30

A JUROR. But you said four shots.

MR. BOZZA. Well, we will ask him.

Q Where were the first four shots fired?

WITNESS. They came from here (indicating.)

Q Were they fired in Caputo's apartment or in your apartment?

WITNESS. Caputo's apartment.

Q Where was this dead man whose name is Tamburro, at the time you heard the first shot?

40

Defendants' Witness, Gerardo Treficanto, Direct

A He was in the same room with Louisa Waldron.

THE COURT. Where were you when you were hit in the head by Caputo?

10 WITNESS. (Indicating Caputo's apartment near the door.)

Q How many times were you hit?

A I was punched and two shots in my head.

THE COURT. Were you punched in the head? How many times?

WITNESS. Two times. We were all drunk, I don't remember myself.

THE COURT. Were you shot in the head?

WITNESS. I was drunk—sure I was shot, I heard the shots, bang, bang, bang.

20 Q How many times were you shot in the head?

WITNESS. I was drunk, twice in the head, and then I was punched.

THE COURT. Twice in the head you were shot?

WITNESS. I shot after I was hit.

Q How many times were you shot in the head?

WITNESS. I told you twice.

THE COURT. How many times were you punched in the head?

30 WITNESS. Only a punch over here and who can remember?

Q Is that the gun you fired (indicating Ex. S-12)?

A Yes, sir.

Q How many shots did you fire?

A I don't remember, about four shots, I was drunk.

Q Showing the witness Ex. S-13, whose gun is that?

40 A Louisa Waldron's, it is not mine.

Defendants' Witness, Gerardo Treficanto, Direct

Q Where was it?

A In my house. When I went to get the coat, it was on the bureau and I saw it there.

Q Showing you Ex. S-13, whose guns is that?

A Mine.

Q Is that the one you had on you at the time you were arrested? 10

A Yes, sir.

Q Showing the witness Ex. S-13. Whose gun is that?

A It is not mine.

Q Do you know whose it is?

A I don't know.

Q Showing witness S-19. Whose gun is that?

A It is not mine.

Q Do you know whose it is?

A I don't know. 20

Q Did you ever see it before?

A No.

CROSS EXAMINATION by Mr. Bozza.

Q How long have you been in the United States?

A About thirteen years.

Q And where did your wife die, in Italy?

A Yes. 30

Q In the thirteen years that you were in the United States, you did not send for your wife, did you?

A She did not want to come.

Q Now, your one son that is alive, where is he, in America or in Italy?

A Italy.

Q And you never sent for him?

40

Defendant's Witness, Gerardo Treficanto, Cross

A I sent them a lot of money and they would not come.

Q Now, you say you know Louise four months?

A Yes.

Q Are you sure about that?

10 A The first two months she was there every day and then for two months after that she used to come and clean once a week.

Q Did you know Louise on November 5, 1927?

A Yes, she came there on the 20th of October, 1927.

Q Now, did Louise ever do any cooking for you or did she merely clean your house?

A She cooked also.

Q And how often did she come to clean your home?

20 A Every day, every week.

Q Now, for these two months that you have been talking about, did Louise Waldron live in that apartment with you steadily?

A I used to go to work and when I would come home and I find her there and she would stay there until nine o'clock and then she could go home. She would not go to bed with me.

30 Q Then, as we understand it, for the first two months, she did your housework every day and then for two months she came once a week?

A When she would be there I was working and at night when I would come home, I would find cooking and I would eat.

Q Now, on March 10, she came when?

A Nine o'clock.

Q That is the morning of the murder?

A Yes.

Q And you went out and you brought home

Defendant's Witness, Gerardo Treficanto, Cross

some fish and some meat and she went into Caputo's house about two or half past two, is that right?

Q A It was about half past twelve when she went in Caputo's house.

Q Now, when you came back with the fish, was she in your house? 10

A Yes.

Q Why didn't you ask her to cook the meat for you then?

A She did not stay there very long. She had a couple of pieces of fish and went out.

Q At any rate, you did not ask her at that time to do any cooking for you?

A It was not necessary to ask her; she cooked so many times before.

Q Without being told? 20

A Without being told.

Q Now, how many times did you go to call Louise before the shooting took place?

A Four times.

Q Now, why did you go and call her the other three times when she already told you the first time she would not come?

MR. WACHENFELD. There is no testimony she said she would not come.

Q And did it take you four minutes to make four visits there to ask her to come to your apartment; did you go each minute, or over what period of time did you make the four visits? 30

A Over an hour.

Q Now, when did you have this gun the first time in your pocket that day? That is Exhibit S-12, the 22 calibre X-and-L double action?

A It was five o'clock after Caputo said that he was going to make me spill blood.

Q When Caputo said he was going to make 40

Defendant's Witness, Gerardo Treficanto, Cross

you spill blood, you went into your apartment and took that gun?

A I took my revolver.

Q And what pocket did you put it in?

A Back.

10 Q In the right rear back?

A Yes.

Q And who was in your apartment when you took that gun and put it in your right rear pocket?

A Nobody.

Q And where did you take that gun from?

A From under my pillow.

Q You kept that gun under your pillow in your bedroom?

A Yes.

20 Q Now, when Louise Waldron said that profane word to you and you slapped her in the face, you did not have that gun in your pocket then?

A No.

Q But it was shortly after that that you went to get it?

A Yes.

Q And that was when Caputo told you he did not like that and you should not do that in his house?

A Yes.

30 Q And Caputo said to you if you do that again in my house I will make you spill blood?

A At the same moment he said in my house if you do anything like that I will make you spill blood.

Q And did you continue there or did you go to your apartment right away to take the gun?

A I went out right away.

Q And you went into your room?

A Yes.

40 Q And got the gun?

Defendant's Witness, Gerardo Treficanto, Cross

A Yes. I went in my room and took the coat and scarf and went back again and I said I was going to call the police officer and I went back to my room and I put the gun in my pocket.

Q Now, when you went out in the street, you had the gun in your pocket, is that right?

A Yes.

10

Q And you want to tell this Court and Jury to believe you were going to the police station to make a complaint against Caputo with a gun in your pocket?

MR. WACHENFELD. I object to the form of the question.

THE COURT. Sustained.

Q Well, were you going to the police station with a gun in your pocket?

20

A I didn't care; who knew it?

Q Now, then, did you have the gun in your pocket when you were upstairs in John Sylvester's house?

A Yes.

Q And that was there Caputo said to Sylvester after he came in, "What do you think of this man, he slapped a woman in the face in my house?"

A Yes.

Q You had the gun in your pocket when Caputo said, "If you go and call the police you won't walk in the world any more?"

30

A Yes.

Q And you say Caputo was intoxicated and you said you would not talk to him that day, you would talk to him the next day; you were sober then, were you?

A I was sober.

Q Now, did he offer Louise Waldron to John Sylvester?

40

Defendant's Witness, Gerardo Treficanto, Cross

A She was in his room.

Q You said on direct examination that he said to John Sylvester, "I have three women downstairs in my room, do you want some women?"

A No, do you want two; I have got three.

10 Q Did he mention which two he wanted to give him?

A No.

Q Well, you were jealous and offended because you thought he wanted to give him Louise Waldron, weren't you?

A No.

Q Well, then, you came downstairs and you went in your house, is that right, with John?

A Yes, sir.

20 Q Now, then, what was the conversation that caused Caputo to say, "Are we going to kill each other on account of women?" Will you please tell the court and jury what led up to that conversation?

A This was said, he said, "For women we are going to kill each other, we are going to kill each other? We are going to eat and drink."

Q Well, was there some quarrel about women up in John's house?

A No, sir, no, sir.

30 Q Was it because of what took place in Caputo's room, do you know?

A No, sir.

Q Do you know why Caputo said that, any reason for it?

A No, sir, because I slapped Louisa Waldron.

Q Now, then, you went over to Caputo's house, did you not, right after that?

A Yes, sir.

40 Q Now, the first time you had anything to drink that day was when you went into Caputo's

Defendant's Witness, Gerardo Treficanto, Cross

house, after John Sylvester left, is that right?

A We were all there, John, too.

Q What time was it?

A Six o'clock.

Q What time did you begin to drink?

A Six o'clock.

Q Where were the women when you first came
in? 10

A In Caputo's house.

Q How many women were there then?

A Three.

Q So that when you came into Caputo's house,
after you had been upstairs to John Sylvester's
house and in your house, Caputo, Tamburro, the
three women, yourself and John Sylvester were
there, seven of you?

A Yes, sir. 20

Q And seven of you consumed a half gallon of
wine, is that correct?

A Yes, sir.

Q Two bottles?

A That's right.

Q How much wine was there before Caputo
went out for the half gallon?

A I don't know.

Q Well, how many drinks did you have before
you had to go out and buy some more? 30

A Three small and two big ones.

Q You had three small and two big ones?

A Yes, sir.

Q Before Caputo went out to buy some more?

A Yes, sir, and then after we drank and I don't
know how many I drank.

Q Well, did each one of you have three small
ones and one big one?

A Two big ones.

Q I am talking about the wine that was in 40

Defendant's Witness, Gerardo Treficanto, Cross

the house when you first came in there, not the wine Caputo went to buy?

A Yes.

Q So before Caputo went out, I understand that each one had three small ones and two big ones.

10 A I drank three small glasses and two big ones.

Q You mean throughout the whole time that you were sitting there?

A Yes, sir, from six to seven.

Q The seven of you had three small ones and two big ones, is that right?

A The three women had not been drinking wine, they drank whiskey.

Q Well, now, did the five glasses of wine intoxicate you?

20 A Then I drank more after, I don't know how many I drank after.

Q Well, how many did you drink all that day up to the time of the shooting?

A Who knows it?

Q When was the last drink before the shooting that you had?

A About half-past seven.

Q That was the last time that you drank, half-past seven, is that right?

A Yes, sir.

30 Q Well, now, Mr. Treficanto, two bottles of wine among seven gives each one a very little bit to drink, isn't that a fact?

MR. WACHENFELD. Now, if your Honor please, I imagine the jury can multiply and divide.

40 MR. BOZZA. I want to show the court and jury that this defendant can drink two bottles of wine all alone and not become intoxicated.

Defendant's Witness, Gerardo Treficanto, Cross

Q Isn't that right, Mr. Treficanto?

A It depends on the stomach. Sometimes on one glass you can get drunk and sometimes a half a glass of wine.

Q But you have already drunk two bottles of wine and were not intoxicated, isn't that a fact?

A I was drunk, sure.

Q The dead man was the one who paid for the wine, is that right?

A \$1.50.

Q Now, when Louisa was in the arms of Tamburro she fainted and fell on her face—struck your foot, you did not like the fact that she was in Tamburro's arms, did you?

A What did I care, they were not my business.

Q You didn't care?

A They were not my business.

Q Why did you slap her in the face if you didn't care?

A Because I called her five times, she had to come and cook in my house.

Q She wasn't your wife or your child that you could insist upon her coming there, was she?

A When she got through working in my rooms and she did not want to stay there any longer, and she does not want to do anything else, I would pay her and send her hom, that's all.

Q How long did Sylvester stay in Caputo's house?

A Until half-past seven.

Q How long altogether?

A From six o'clock.

Q So that if he says he was there for only a minute, for the period of time he came to bring the pipe to you he is mistaken?

A In my house, yes, three or four minutes,

10

20

30

40

Defendant's Witness, Gerardo Treficanto, Cross

that's all. We were in Caputo's house.

Q Now, when Caputo brought Mary Brennan into your bed was Mary Brennan walking or did he carry her?

10 A He took her by the arm and brought her to my house.

Q And where was it that then he said if Mary Brennan did not come he would hit her, in your apartment or in his apartment?

A In his apartment.

Q And it was after that that Mary Brennan came into your room that you were ready to go to your room?

A Yes, I went to light the gas.

20 Q And then Caputo came back with some whiskey, didn't he?

A Yes, sir.

Q What were you doing to Mary Brennan when Caputo came back?

A Mary Brennan was in bed and I was sitting at the table in the kitchen.

Q Well, now was Mary Brennan dressed?

A Yes.

Q Did you remove any of her clothing?

A No, sir; I didn't even go near the bed.

30 Q Didn't Caputo come in there and quarrel with you about what you were doing to Mary Brennan?

A No.

Q Well, it was shortly after that Caputo punched you and fired two shots at your head, is that right?

A Well, she was going, "Joe, Joe" to Joe in my house, and I went over to Caputo and said she was making too much noise over there and I said, "Come and get her."

40 Q And the only reason that Joe punched you

Defendant's Witness, Gerardo Treficanto, Cross

twice on the head and fired two shots at you was because Mary Brennan called out his name?

A "Joe, oh Joe, oh." He was the boss.

Q And the only reason why he hit you then, as far as you know, is because you told Joe Caputo that Mary Brennan was calling him, is that right?

10

A Yes. I told him to come and take her, I am going to Bank street.

Q He did not touch you when he learned you were going for the police, did he?

A No.

Q And he did not lay hands upon you when you were talking about the foolish thing to kill each other over women, did he?

A No, sir.

Q When you went in to inform Caputo as to what Mary Brennan was saying, what was Louise Waldron doing in Caputo's apartment?

20

A I don't know what they were doing in the other room. They were in the other room.

Q Where was Caputo, in the kitchen or in the bedroom?

A In the room, in the kitchen; this is the stove and this is where he was.

Q And now, Mr. Treficanto, this is the alley way that takes you into the rear building. This is the corner of the rear building on the first floor. This is your kitchen and bedroom?

30

A Yes. This is my house (indicating).

Q This is Caputo's kitchen, and this is his bedroom?

A Yes.

Q To go to Caputo's kitchen, you leave your door and you go right into Caputo's door?

A Yes.

Q Now, when Mary Brennan was saying, "Joe, Joe, Joe," you left your apartment here and you

40

Defendant's Witness, Gerardo Treficanto, Cross

went into Caputo's apartment?

A Yes.

Q You heard her say, "Joe, Joe, Joe," you went out of this door and through your door across the corridor into Caputo's kitchen?

10

A Yes.

Q And with this gun in your right hand pocket?

A Yes.

Q Now, when you came in there, where was Caputo? Take this pointer and show us where Caputo was?

A There.

THE COURT. Indicating what?

20

MR. BOZZA. Pointing to the end of the doorway, the northern doorway of Caputo's apartment between the kitchen and the bedroom. We will put a dot there.

Q Where was Tamburro when you first came in?

A I could not see him. He was inside.

Q Tamburro was in the bedroom?

A Yes.

Q Was he sleeping on the bed?

30

A I don't know whether he was sleeping or standing up.

Q Well, did you look in the bedroom?

A No.

Q Was he on the bed with Louise Waldron?

A I don't know if they were having connection or what they were doing.

Q Now, then—

A God damn it.

Q Now, then, while Caputo was standing there, where were you standing in the kitchen?

40

A I went in this way and called him to come

Defendant's Witness, Gerardo Treficanto, Cross

over and get this Mary.

Q What was he doing when you told him to come and get Mary?

A He was standing.

Q Who?

A Caputo and this woman.

A And where were they standing?

10

A (Indicating).

Q Where was Miss Smith, the New York woman?

A Right here.

Q Near the ice box?

A Yes.

Q Put another dot there.

A You say yes, I will say yes, too.

Q Where was Tamburro at that time?

A I don't know. I didn't see him. I was in the kitchen.

20

Q Now, where were you when you were punched or struck by Caputo?

A There (indicating).

Q And then you fell?

A I fell.

Q Did these two shots that you heard go by your head?

A Yes, sir.

Q Where did the two bullets strike you?

30

A One struck me on the right side on the top of the head and the other in the center in the back of the head.

Q Where was Tamburro when you were punched?

A I did not see him.

Q And you pulled your gun out while you were on the floor?

A While I was on the floor.

Q And you fired two shots, did you not?

40

Defendant's Witness, Gerardo Treficanto, Cross

A Two on the floor and two in the air.

Q Why did you shoot in the air when Caputo had fired directly at you and the bullets had struck your head, where you have indicated? Why did you shoot in the air?

10 A Because he was standing here and the shots came from inside and I shot in the air.

Q You saw Caputo shoot you, did you not?

A No, sir, as I was punched at the same time I got shot.

Q Did you see a gun in Caputo's hand?

A No, sir, I didn't see no revolver.

Q And who did you fire at?

A Nobody, who could I shoot at?

20 Q Didn't you fire at Caputo because he had struck you and caused you to fall?

A No, sir.

Q Did you see anybody fire those two shots that struck you?

A No, sir, I didn't see nobody.

Q Did Tamburro shoot you?

A I didn't see it.

Q Did Caputo shoot you?

A I did not see it, Caputo punched me.

30 Q Did you at any time turn your gun on Caputo while you were in Caputo's apartment?

A No, sir.

Q What did you mean before on direct examination when you said "I did not shoot at them because the woman was near Caputo"?

A She was standing near the door.

Q The reason why you did not fire at Caputo was because this New York woman, Laura Smith was standing near Caputo?

A That's all.

40 Q And you shot up in the air?

A I shot up in the air.

Defendant's Witness, Gerardo Treficanto, Cross

Q But at no time when you fired did you aim at Caputo nor anybody else?

A No, sir.

Q And the only time you fired was two shots on the floor and two shots up in the air, is that right?

A Four shots. 10

Q Now, you fired some shots from outside, through this window, did you not?

A No, no.

Q You did not?

A No, sir, only four shots inside.

Q I show you Exhibit S-12 and ask you if this is the gun you put in your pocket about five o'clock when Caputo said he would make you spill blood?

A That's all, it is an Italian gun. 20

Q This is an Italian gun?

A Yes, sir.

Q Isn't it a fact that it says here, "S L. double action Hopkins and Allen Arms Company, Norwich, Connecticut, U.S.A.?"

A Yes, sir.

Q You fired four shots out of this gun?

A Yes, sir.

Q How many bullets were in that gun, loaded bullets, before you fired the four shots? 30

A Six.

Q Was the gun fully loaded?

A Yes, sir.

Q Isn't this a seven chamber gun, and wasn't there seven loaded bullets in there?

MR. WACHENFELD. I call you Honor's attention to the fact that this witness, on direct examination, said he was intoxicated, but as near as he can remember it was four shots. 40

Defendant's Witness, Gerardo Treficanto, Cross

THE COURT. Never mind, that don't need to be called to my attention. The question now is how many chambers are in this gun. If you want to call anything to anybody's attention, especially the jury, why, do so, when you address them?

10

A Four and three were not shot.

Q Now, after you fired the gun what did you do with the gun?

A I went in my room and put in it my bureau.

Q You went into your room and put it in your bureau, was that soon after you fired the shots?

A Yes, sir, I took my key and I went to the drawer and I put the revolver in it.

20 Q Did you break the gun open again to count how many empty shells you had and how many loaded shells you had?

A No, sir.

Q So that if two loaded bullets and five empty shell were found in that gun you wouldn't say you fired those five shots?

A I shot four.

Q Well, did you lose possession of your gun while you were firing in Caputo's apartment?

30 A One was shot New Year's. There was only six loaded.

Q One was shot New Year's night?

A Four I shot inside and one New Year's night.

Q You did not shoot at any police officer, did you, as Caputo stated in his statement?

MR. WACHENFELD. I object to that.

THE COURT. Sustained.

40 Q Now, when you went to your bureau after the shooting of four shots, as you have testified, isn't it a fact that you deposited this gun there,

Defendant's Witness, Gerardo Treficanto, Cross

too, and took this one, pointing to the automatic S-18 and to the revolver S-13?

A This was on the bureau and it belonged to Louise Waldron. Every time she came to my house she came with a gun in her pocket.

Q Now, when Louise came to your house on Saturday morning, March 10, did she bring this gun with her? 10

A Yes, sir. When she came there she would bring the revolver with her. When she would go away she would bring the revolver with her, and I had the cartridges myself.

Q Did she buy these two boxes of cartridges?

A One belonged to my gun here, and one belonged to her.

THE COURT. That is exhibit what?

MR. BOZZA. That is S-13. 20

Q That is your gun?

A Yes.

Q The 32 calibre bullet?

A Yes.

Q And this box of bullets, automatic 32 calibre Colt, automatic bullets, you bought them when?

A I bought them in New York November 5.

Q And when you went to buy the cartridges for this gun, did you bring the automatic with you?

A No, I took one of my cartridges as a sample. 30

Q How long after you bought these Colt automatic cartridges for Louise Waldron did you give it to her?

A On the 5th day of November, when I came from New York, I put some in her handkerchief, and I told her to take them to her house.

Q Well, did you give her the whole box of bullets?

A She took some of it, and then the rest of it was left there. 40

Defendant's Witness, Gerardo Treficanto, Cross

Q Then, Saturday morning, March 10, she came with a whole box of steel jacketed bullets 32 calibre and with the automatic S-18?

A With a revolver in her pocket, but the cartridges, they were in my house.

10 Q You say that this was resting on the bureau in your bedroom, is that right?

A Yes.

Q And these steel jacketed bullets were where in the drawer in the bureau?

A In the bureau.

Q The second drawer from the top?

A Middle drawer.

Q How many drawers are there in your bureau?

A Three.

20 Q So this was in the middle drawer?

A Yes.

Q And this one was resting on top of the bureau?

A Yes.

Q Now, when you put this gun back you took this one S-13 fully loaded and put in in your pocket, did you not?

A Yes.

Q And this was the gun that was in your possession when you were arrested, is that right?

30 A This is the revolver.

Q So these two are yours, is that right?

A Yes.

Q Now, in addition to this 32 calibre loaded revolver, you also had this knife in your possession, Exhibit S-15?

A I used that for my pipe.

Q Oh, you used this for your pipe?

A Yes.

Q What has this got to do with your pipe?

40 A Clean it.

Defendant's Witness, Gerardo Treficanto, Cross

Q You use this knife with this sheath for the sole purpose of cleaning your pipe, is that right?

A From the pocket, to clean the pipe, not because I want to carry a big knife.

Q Now, what pocket did you have this in when you were arrested?

A (Indicating).

10

Q And in what pocket did you have this gun when you were arrested?

A That pocket there.

THE COURT. Indicating what?

WITNESS. Indicating the right hip pocket.

Q That is Exhibit S-13. The same pocket where you had the 32 calibre revolver Exhibit S-12?

A That is all.

Q Now, did you ever see this gun, Exhibit S-19, a 32 calibre American double action? 20

A No, sir, I did not see that revolver.

Q Do you know of your own knowledge if Caputo owned a gun?

A No, I don't know anything about it. I didn't know anything about it.

Q Isn't it a fact, Mr. Treficanto, that when you fired the four shots in Caputo's apartment you immediately left Caputo's apartment, picked up that automatic and went outside and fired through the window? 30

A No, sir.

Q And you then went back into your apartment and deposited the 22 automatic and picked up the 32 revolver which was found in your possession when you were arrested?

A No, sir.

Q Now, if you were so drunk as to not remember who fired at you and whether or not you fired at anybody, how did you come to take this revolver and put it in your pocket as you were going outside, 40

Defendant's Witness, Gerardo Treficanto, Cross

were you looking for more trouble?

A Because when I left there I was going to Bank street to Bucino's house and I know I was going to come home at one o'clock in the morning, and I said there are five of them so I took this gun with me for my protection.

10

Q What five did you mean?

A As I put this one in the bureau I took this other revolver because I was going on Bank street. I put this in my pocket to go on Bank street to visit Bucino and I said when I come back home at one o'clock in the morning there are five of them and they may be waiting for me and they might kill me.

20

THE COURT. What five are you talking about?

WITNESS. Tamburro, they say he is dead, Guiseppe Tamburro, Louisa Waldron, there were five of them. Three women and two men.

THE COURT. What five do you mean, name them, give me the names.

MR. BOZZA. He did name them.

30

MR. WACHENFELD. The dead man and Caputo and the three women.

Q Now, when you put the 22 calibre revolver in the drawer and you took this revolver you knew where you were going and what you were going to do, and what time you were coming back and you reasoned you needed it for protection, is that right?

A Certainly.

40

Q Now, in front of your window, over here, facing the alley at your kitchen window, was there any wire work there?

Defendant's Witness, Gerardo Treficanto, Cross

A No, sir.

Q How about the window of Caputo's apartment, did that have any wire netting or wire screens?

A I don't know, I go out early in the morning and I go out late at night and I don't know.

Q Were you ever convicted of crime?

10

A No, sir.

Q Didn't you live at 20 Bedford street in June, 1924?

A Yes, I was in jail before, eighteen months.

Q You pleaded non vult to assault and battery resulting from an indictment for carnal abuse, is that right?

MR. WACHENFELD. I object to that, if the court please, and say it is highly improper and also that the Prosecutor knows better. It is either carnal abuse or assault and battery. The question is highly prejudicial and the Prosecutor knows it, and I object to it.

20

THE COURT. What was the plea for?

MR. BOZZA. If your Honor please, I am reading the record. It states the offense and then says, "Nun vult to Assault and Battery".

THE COURT. Yes, but the rest of it about carnal abuse is stricken out.

30

Q And you were sentenced by Judge Caffrey to eighteen months in the County Penitentiary.

A I was accused and when I was sentenced I came in one way and went out the other way. They sentenced eighteen fellows in a few minutes, in a half hour.

Q This was assault and battery committed on a girl fourteen years of age by the name of Mary Catalana, was't it?

40

Defendant's Witness, Gerardo Treficanto, Cross

MR. WACHENFELD. I object to that.

THE COURT. I am just thinking whether that would be disclosed by the record. I don't think it would. I think it would not appear so I sustain the objection.

10

Q Did you say at any time to the police officers that you fired five or six shots?

A No.

Q If it is in the statement made to the police officer and signed by you, would you say that you made such a statement?

A Four or five shots.

Q Well, now, is this your signature, and I show you Exhibit S-23; I ask you if that is your signature?

20

A Yes, it was a larger paper than that.

Q Is that your name?

A Yes.

Q Now, did you sign that name there on that sheet and there on this other sheet?

A Yes.

Q And did you say—Raphael Capadonna and Coccozza—

A I could not talk, my head ached. I was there forty-seven days.

30

Q Now, did you say in that statement, "And when I heard three shots of a revolver, I pulled my revolver out, which is a 22 calibre, from my right rear pocket of my trousers, and I fired five or six shots from my revolver as I was going out of the kitchen door?"

A No, sir; I do not remember. I know how I felt.

40

Q Well, wasn't your memory better on March 12, two days after this thing occurred than it is on the witness stand?

State's Witness, Louise Waldron, Direct

A Christ know. My head pains me.

Q Now, didn't Tamburro at any time lay a hand on you, or have any words with you at any time that day?

A No, we all talked about the wine, that is all.

Q And you and Tamburro were friendly, were you not? 10

A I didn't know him and he didn't know me.

Q And the only one you had any words with was, as you testified, with Caputo?

A With Caputo.

DEFENDANT TREFICANTO RESTS.

RECESS until 2:30 P. M.

AFTER RECESS. 20

LOUISE WALDRON RECALLED in behalf of the State in rebuttal.

DIRECT EXAMINATION By Mr. Bozza.

Q Mrs. Waldron, it has been testified that you are the owner of an automatic pistol and the magazine of an automatic pistol, Exhibit S-18. Are you the owner of that automatic and that magazine?

MR. WACHENFELD. I object to that your Honor. 30

THE COURT. She has already testified she did not own that gun.

Q It has been testified that a box of steel jacketed bullets, thirty-two calibre, for an automatic was purchased for you?

A No, sir.

Q And that some of those bullets were given 40

State's Witness, Louise Waldron, Direct

to you; were they?

A No, sir.

10 Q It has been testified that on the morning of Saturday March 10th, when you came to the house of Treficanto that you brought with you this magazine an automatic pistol, Exhibit S-18, and that it was on the bureau that morning?

A No, sir.

Q Now, in cleaning up the house did you see this automatic on the bureau in the bedroom?

MR. WACHENFELD. I object to that as not rebuttal.

20 THE COURT. I don't think it is rebuttal, Mr. Prosecutor, as to whether she saw it around the house.

MR. BOZZA. On the bureau where the defendant stated it was. This is new matter. The officer stated on direct examination on the State's case that they found this automatic, together with the 22 calibre revolver in the drawer. The defendant then develops new matter and says it was resting upon the bureau. I offer this witness in rebuttal of the fact that it was not on the bureau but in the drawer where the officer found it.

30 THE COURT. I am not sure it is rebuttal. I will allow it, notwithstanding. It may be considered as reopening your case on that subject and there may be cross examination on that subject and the offer of any new evidence which may be thought necessary by reason of that introduction.

Q Did you see this automatic pistol on the bureau in Treficanto's bedroom?

40 A No, sir.

States' Witness, Louise Waldron, Cross

CROSS EXAMINATION By Mr. Wachenfeld.

Q Did you see it in the drawer?

A I didn't see it at all.

Q Did you ever see it before?

A No, sir.

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BOTH SIDES RESTS.

Judges Charge

THE COURT. Do you wish to renew your motion?

MR. SIMANDL. I have already made my motion, my case is closed. I am only asking for a decision on the motion.

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THE COURT. Gentlemen of the jury, the defendant Caputo moves for the direction of a verdict of acquittal. The bill of particulars which the state has served states that the State does not contend that the bullet which killed this man was fired by Caputo. There is no evidence to show that these men were fighting by preconceived arrangement. There is no evidence to show that Caputo agreed with Treficanto to do any of these things. This killing occurred in Caputo's apartment. According to the testimony of the State's witnesses, Treficanto came to the door of Caputo's apartment and began to fire at him. If that be true, Caputo had a perfect right to fire back. He was not called upon to retreat. He had the right to stand his ground and if he could get ahold of the gun and pull it out and kill his assailant. Under those circumstances, I see no ground upon which a verdict could be sustained of guilty as far as Caputo

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Judges Charge

10 is concerned, beyond a reasonable doubt. Had the bullets fired by Caputo taken effect and caused the killing, a different situation would be presented, but that did not occur according to the testimony and according to the bill of particulars, and that not having occurred and the circumstances being such as they are, I am of the opinion that there should be the direction of a verdict in favor of Caputo and I now direct you to find a verdict of not guilty insofar as the defendant Caputo is concerned. As to the defendant Treficanto, the case will be in due time submitted to you for your verdict, but at the present time you will render a verdict of not guilty as far as Caputo is concerned.

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(The jury accordingly render a verdict of not guilty as to the defendant Caputo.)

MR. WACHENFELD. I now move to strike out all the testimony admitted in this case which was admitted as against the defendant Caputo.

THE COURT. Only?

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MR. WACHENFELD. Yes, sir.

THE COURT. Motion granted.

MR. WACHENFELD. I also move to strike out and remove from the record the statement admitted in the record as made by Caputo, the number I do not know.

THE COURT. Motion granted.

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MR. BOZZA. How about Caputo's gun, don't you want to move that go out?

Judges Charge

MR. WACHENFELD. No, I do not.

MR. BOZZA. The state moves, in view of your Honor's direction of a verdict, to strike out exhibit S-19, the gun that was found on Caputo's bed, together with all other statements and the bullets accompanying Exhibit S-19, Exhibit S-20, to remove from the case with all the other evidence in the case and the testimony and the statement. 10

THE COURT. I think you better specify what you refer to. You refer to that gun and those bullets. That much is quite definite and anything else you refer to?

MR. BOZZA. That together with what your Honor has already ruled out. 20

THE COURT. What is the view of the defendant?

MR. WACHENFELD. The defendant is perfectly willing to permit the gun to remain in evidence, because it is an important part of our case.

MR. BOZZA. On that statement of counsel for the defense, I beg leave to withdraw my motion to remove it from the case. 30

MR. WACHENFELD sums up for the defendant Treficanto.

Mr. Bozza sums up for the State.

Judges Charge

Gentlemen of the jury. There are four instructions which are paramount ones and my entire charge is to be understood as controlled by and subordinate to them. First, the Court is the judge of the law and as such it is its function to pass upon all questions of law arising in the trial and to inform the jury of the law governing the case, and it is the duty of the jury to follow the law as it may be stated by the Court. Second, the Court has no power to decide or to instruct the jury how to decide any question of fact, but the jury are the sole and final judges of the facts, the weight of testimony and other evidence, the credibility of witnesses, inferences to be drawn from the evidence, and of all issues and questions of fact whatever, including the ultimate conclusion of guilty or not guilty, as well as the degree of guilt, if any, to be reached upon all of the evidence in the case. As judges of the facts it is their function, responsibility and duty to recollect what the evidence is and all the evidence, the appearances during the trial, the appearance and conduct of the witnesses, whether evidence is or is not in the case and whether it is disputed or undisputed and to be controlled by their own recollection alone in all such matters. If the Court should at any time make any statements of its recollection or should even go further and make definite affirmations, no matter how positive with regard to any of such matters, it is the duty of the jury to disregard such expressions of the Court, except where the same coincide with their own recollection. Third, the Court has a right to comment upon the evidence, but in deciding the case the jury must do so not only on the evidence referred to by the Court but

Judges Charge

on all the evidence. The Court has also the right, if he sees fit, to express his opinion on the evidence, pointing out what evidence, situations and circumstances seems to him salient, controlling or persuasive and indicating any inferences or conclusions of facts which he may draw from the whole or from parts of the evidence, but the Jury are not bound by any such expressions and may disregard any or all of such expressions if it sees fit. Fourth, the defendant is presumed to be innocent and he must be proved beyond a reasonable doubt guilty of the crime charged and of each and of all of its elements. The burden of so proving the defendant guilty rests upon the State throughout the whole case and never shifts. This rule is an ultimate one surviving all others. It is an independent and final protection to defendant and notwithstanding all other presumptions and burdens if any arise in the case it remains upon the State until and after all the evidence is in, when the jury must consider upon all the evidence in the case, whether or not this burden has been sustained. If the jury are then satisfied upon all of the evidence that the defendant is proven guilty beyond a reasonable doubt, the verdict must be guilty of the crime or the degree of crime so proven, and if not so satisfied, the verdict must be not guilty. Reasonable doubt is not a mere possible doubt. It is that state of the case which after an entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

There is an aspect of the law, gentlemen, in this case, which I think it would be well for you to have in your minds during the entire charge of

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Judges Charge

10 the court. It is this: If you find that the death of Tamburro resulted from a pistol shot fired by Treficanto and intended by him for another person, the question of Treficanto's guilt and the degree of his guilt, if guilty, is to be determined precisely the same as if the bullet had killed the person for whom it was intended.

I have received several requests to charge from counsel for the defendant. One of them is this:

20 In passing upon the act and actions of the defendant Treficanto, you, the jury, are not to hold him to the same cool and correct judgment that you are able to form, but you should put yourself in this case and judge his acts by the facts and circumstances by which you find he was surrounded. I so charge you.

Another request, the statute distinctly provides that any person who shall kill either by misadventure or in his or her own defense shall be guiltless and duly acquitted and discharged and I therefore direct you that if you find that the deceased in this case was killed by misadventure or by the defendant Treficanto in his own defense you shall bring in a verdict as to the defendant Treficanto of not guilty.

30 I will charge you that, gentlemen, and you will take into consideration, however, with it, self defense as I will explain it to you, and misadventure as I will explain it to you. Also, the statement which I made to you a few moments ago with regard to the situation where a man fires a gun or where such a situation may arise or you might find exists in this case, where a man fires a gun at another man and kills a third person, and the gun was fired at the first man with intent, deliberation, premeditation and intent to kill, it is murder, if another man besides the one fired at is

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Judges Charge

killed. Now, I am not sure but what I made that a little confusing. I had better state it in the language I stated it before. If you find that the death of Tamburro resulted from a pistol shot fired by the defendant Treficanto, and intended by him for another person, Caputo, the question of Treficanto's guilt and the degree of his guilt, if guilty, is to be determined precisely the same as if the bullet had killed the person for whom it was intended.

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Now, then, this request contains a reference to self defense, or rather, I mean to say to misadventure.

Misadventure is where a person unintentionally kills another in the doing of a lawful act without gross negligence. Now, if Treficanto was trying to kill Caputo, of course, he was not doing a lawful act, unless he was doing so in self defense, and I will explain self defense to you a little bit later.

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I have another request, as follows:

There are three necessary ingredients for murder in the first degree, to wit: Wilfull, deliberate and premeditated, and if you find any of these three absent you cannot convict the defendant of murder in the first degree. I so charge you, gentlemen.

Another request: Manslaughter is where a person kills in the heat of blood or in the sudden transport of passion or where he proceeds upon a reasonable provocation without malice. I so charge you, gentlemen, and in that connection I have something to say about provocation.

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Now, the provocation which is claimed to have existed in this case is the violence of Caputo in his manner of fighting with the defendant, using a gun and hitting him on the head, according to the testimony of the defendant, and the defendant

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Judges Charge

claims that these acts of Caputo were such as to be a reasonable provocation to have thrown him into a transport of passion or heat of blood. As far as I can recall he did not say he was thrown into a passion or a heat of blood, but it will be for you to determine whether he was or not.

- 10 Now, if a man prepares for an affray secretly and arming himself, and commences it with the pre-conceived purpose of killing his adversary, **or doing him great bodily harm, and does kill him**, or does kill a bystander present at the affray, nothing that may have occurred during the affray can reduce the killing to manslaughter. The provocation under such circumstances is of no value as a defense. The provocation as a defense has no value to the defendant except in the consideration of the
- 20 degree of murder and consideration of the question of **whether or not the jury will recommend imprisonment for life or, as it is commonly termed, mercy.** In such a case, as I have outlined here, the express malice of the first assault, notwithstanding any violence with which it may have been returned, communicates its character to the act of killing and the accused cannot be heard to say that the homicide was by reason of a transport of passion or heat of blood, caused by the violence of the
- 30 deceased. If the defendant prepared for this affray by arming himself with a deadly weapon and sought the occasion and provoked the affray with the pre-conceived purpose of killing Caputo, or doing Caputo great bodily harm, he cannot be heard to say that he acted under a transport of passion or heat of blood, no matter what violence, whether by use of a gun or otherwise Caputo resorted to in the course of the affray thus commenced. As I said before, the defendant's **express malice closes the door against him in such a case as far as provo-**
- 40 **cation is concerned.**

Judges Charge

Another request. If you find from the evidence in this case that the defendant Treficanto, was assaulted either by the other defendant Caputo or the deceased, Tamburro, and that he shot in self-defense, you must bring in a verdict of not guilty. I so charge you. But I should explain more fully self-defense to you. An accused is justified in using force to defend his person only when force is necessary or reasonably appears to be necessary to accomplish that end. If the injury apprehended could be otherwise reasonably avoided with safety, the accused was bound to avoid the danger without resorting to violence. One who is attacked and unable reasonably to avoid the attack with safety may repel force with force to such an extent, even to the extent of killing his assailant, as is reasonably necessary or reasonably appears necessary to defend himself. Even if the circumstances be such as to require the use of force to repel the assault, he will be inexcusable if he carried his defense beyond the bounds of reasonable necessity or the reasonable appearance of necessity. The danger must be immediate and must be actual or else apprehended on reasonable grounds, of all of which the jury is the judge. Furthermore, where the justification for self-defense springs from the claim that an assault was made upon the defendant, the first consideration is was the assault made and if you are satisfied that one was made, then the next consideration is **whether the defendant prepared for and provoked the affray. If you find beyond a reasonable doubt the defendant prepared for and provoked the affray, he cannot set up successfully a plea of self-defense. Such a defense is not open to him.**

Now, I have another request. "The defendant Treficanto was justified in discharging his revolver

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Judges Charge

in self defense if he was assaulted by either of the other two men, and it was necessary for him to defend himself in order to save his life or prevent serious bodily harm." I so charge you.

10 Another request. There is evidence in this case which, if believed, by you gentlemen of the jury, will permit you to consider a verdict of manslaughter in this case. I so charge you.

Another request. If you are under a reasonable doubt as to whether the defendant committed murder in the second degree or manslaughter, you must, under your oath, render a verdict of manslaughter. I so charge you.

20 Another request. The admitted intoxication of the witnesses produced in behalf of the state, is a matter which you may consider in determining what weight you are to give to their testimony. I so charge you. And while we are on the subject of the weight to be given to the testimony, let me explain to you the effect of a prior conviction of crime. The defendant has admitted that he has been previously convicted of crime. That does not show or tend to show that he is guilty of the crime for which he is now being tried. The only effect of that is to affect his credibility. You may take that into consideration in weighing his testimony and determining how much of it you will accept or what weight you will give to it, and that is the only purpose that it can be legitimately used for.

30 I have another request. If at the time of doing the act, the defendant was so intoxicated that his faculties were prostrated and he was rendered incapable of forming a specific intent to take life, then, although it was no defense for the crime, his offense will thereby be mitigated to murder in the second degree. I so charge you.

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Judges Charge

You will find that the question of intent enters in a very important way into this case, and as that charge has already stated, if the defendant's faculties were so prostrated by intoxication that he could not form this intent, then, of course, he could not form it to such extent as it may be essential in any crime and it is absent because he could not form it by virtue of intoxication, of course, there can be no conviction of that crime or degree of crime.

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You have heard the testimony. Of course, the views of the respective sides do not harmonize.

The defendant contends that while he was in this apartment of Caputo's, that he was attacked by Caputo, two shots were fired at him; I believe he said two shots struck him in the head and he was hit on the head, and he maintains that he was acting lawfully when he fired his shots; that he was acting in self defense, and that if it was his shot or shots which took effect, which he does not admit, but denies, still he is not guilty, because he says he was acting in self defense. He claims that after this affray was over, he went out of the apartment, went to his room, put the gun away that he had, took out another gun, and put it in his pocket and started to go, as I understood him, to the police station, but I notice in the Prosecutor's summing up he says he was going somewhere's else. However, as I have stated, your own recollection must control with regard to the facts.

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The State has a different viewpoint. The State says that these people were drinking. There is a great difference between having the blood inflamed by drinking and having the faculties so prostrated by drink as to be unable to form an intent to do a certain thing. Many times a man may have his faculties inflamed by drink and

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Judges Charge

still be able to form an intent to kill or form an intent to do great bodily harm.

10 It is contended that these witnesses were intoxicated and the defense contends that their testimony is to be affected by that fact and their version is not to be accepted because of that fact. As I recall it, the State's witness, those who were in that room, all agree, but you must not take my viewpoint unless it agrees with your recollection, that this defendant Treficanto came to that doorway to Caputo's apartment and began to shoot at Caputo. You will recall that I directed a verdict in favor of Caputo. **You must remember that the position of Caputo was a very different one from that of this defendant Treficanto.** Caputo was in his own castle within the law. He was entitled to protect his castle.

20 He was entitled to protect his castle. A man is always entitled to protect his castle, to protect himself in his castle, from time immemorial, and although this was merely an apartment and a poor one at that, still, within the view point of the law, this was in his castle, and **I have ruled that what he did was in the protection of it, and therefore, he must be found not guilty.**

30 The defendant Treficanto was not in his castle, according to the testimony and the State's case. He was in Caputo's apartment, and according to these witnesses, some altercation occurred over this woman, or something else, and Treficanto came in and threw into this woman's face her clothes, and that they had some words and at one time he smacked her, struck her, and went out, and, as I recollect the testimony, it was two hours afterwards that he came back and when he did come back he came to that door and he stood there and

40 he began to shoot at Caputo as they say, and Ca-

Judges Charge

puto was standing over in the corner there to the left, and when he begun to shoot at him he made for his trunk, which was in the other room, opened it and got out his gun and proceeded to resist the attack by shooting back at Treficanto. According to witnesses they exchanged shots and then Treficanto left, and in a little while shots came through the window, and the State contends that as that automatic was found in his apartment, according to the police testimony, and as one of the bullets found in this dead man's body was, according to their testimony or some testimony, from this particular gun, that it was Treficanto firing through the window with that gun. Now, that is what the State contends. The State contends that all of these guns, or some of them, were found in Treficanto's apartment and that he was arrested with one of them on his person, one in one pocket and that knife there in the other.

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It is for you to decide these questions of fact. It is for you to do it, as I have already told you, not only upon such evidence as it has occurred to me to refer to, but upon all of the evidence.

You will take all of the evidence and if the defendant Treficanto shot and killed Tamburro in an attempt to do Caputo great bodily harm or with the intent to kill Caputo, but such intent to kill was not wilfull, deliberate and with premeditation, then he is guilty of murder in the second degree. But, if the defendant Treficanto shot and killed Tamburro in an attempt and with the intent to kill Caputo and the attempt was wilfull, deliberate and with premeditation, then he is guilty of murder in the first degree.

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Now, gentlemen, I hardly think that it would help you any for me to discuss the facts any further with you. I don't think it would be of any

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Judges Charge

benefit to you. You have heard the case tried and summed up ably, and of course, you, as the judges of the fact, must assume the burden of passing upon them.

I wish to call your attention, however, to this:

10 That the statute of our State requires that the jury, if it finds a conviction of murder, shall designate whether they find murder in the first degree or murder in the second degree; so, you will please remember, that if you should find the defendant guilty of murder you are to specify in which degree is your verdict. In case your verdict should be murder in the first degree, you will also please remember that the law now provides that every person convicted of murder in the first degree shall

20 suffer death, unless the jury shall, in their discretion, and by their verdict, and as part thereof, upon and after consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed.

In conclusion, gentlemen, bearing in mind first the four paramount instructions in the beginning of my charge and that they are paramount, and secondly, also the other portions of the charge, you will take the case upon the entire charge and upon

30 all the evidence in the case, and, before you retire, gentlemen, let me thank you for your patient consideration of the matter. Let me express my regret that it was necessary to detain you from your homes for this length of time, but for many, many years, both here and in England, from which country our law originated, it has been the law in capital cases that the jury must be segregated, so that the court has had no discretion in the matter. So, gentlemen, you will please enter upon your

40 deliberations.

Exceptions

(The jury retires.)

MR. WACHENFELD. I except to that portion of the charge which your Honor repeated three times with reference to the law, which the jury should bear in mind, to wit: that an intent by another would act precisely the same as if the bullet had killed the person for whom it was intended.

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THE COURT. You may have an exception to whatever the court said.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

MR. WACHENFELD. Also to what your Honor said about a situation where a man fires a gun at another and it strikes a third person, the wilful intent carrying over to the third person.

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Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

MR. WACHENFELD. An exception to what your Honor said as to the definition of misadventure.

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Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

MR. WACHENFELD. An exception to what your Honor said about self-defense.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

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DALLAS FLANNAGAN,
Judge.

Exceptions

MR. WACHENFELD. Exception to what your Honor said, that killing in a brawl cannot reduce the degree of crime to manslaughter.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

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DALLAS FLANNAGAN,
Judge.

MR. WACHENFELD: To what your Honor said about closing the door as against the reduction of the crime to manslaughter.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

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DALLAS FLANNAGAN,
Judge.

MR. WACHENFELD: Exception to what your Honor said about the evidence, that there was evidence that the automatic bullet taken from the body of the deceased was discharged from the automatic gun offered in evidence, upon the ground that there is absolutely no such evidence in the entire case.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

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DALLAS FLANNAGAN,
Judge.

MR. WACHENFELD. And a general exception.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

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(The jury returns into Court).

Judges Charge

FLANNAGAN, J.

Gentlemen. I am sorry to have to put you to the trouble of coming into the courtroom to answer the question which you asked me, but under the law any instruction which I may give to the jury must be given in open court and hence I must ask you to come in here and put you to that trouble. 10

Before I answer your question, my attention has been called to an inaccuracy in my charge, and in my charge I said that there was testimony that a bullet found in the deceased's body was from this particular gun, referring to the automatic pistol. What I should have said was there was some testimony that a bullet Dr. Martland testified was found in the deceased's body was from a gun of the kind of this particular gun. So you will please consider that particular correction made. 20

The inquiry I have is this: "Please supply information regarding the penalties of first and second degree murder."

I will read to you the statute on that subject.

"Every person convicted of murder in the first degree, his aiders, abettors, counsellors and procurers, shall suffer death, unless the jury at the time of rendering the verdict in such case shall recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed, and every person convicted of murder in the second degree shall suffer imprisonment at hard labor not exceeding thirty years." 30

In other words, a verdict of murder in the first degree, without recommendation by the jury of life imprisonment at hard labor, carries a sentence of death and a verdict of murder in the first degree with a recommendation of life imprisonment at hard labor by the jury carries a sentence of life 40

Judges Charge

imprisonment at hard labor. So much for first degree murder.

Is that all plain as far as first degree murder is concerned?

10 (The jurors express their satisfaction.)

Murder in the second degree carries a sentence of imprisonment at hard labor for any time the Court may see fit to fix, but not exceeding thirty years. In other words, the Court may fix such time as it sees fit, one, two, three, four, five, ten, fifteen, twenty, twenty-five or twenty-six, and so on, but the Court cannot exceed thirty years. It is then for the Court to fix the time of imprisonment at hard labor, the limitation on the Court's

20 power being that the Court cannot fix more than thirty years at hard labor. So, gentlemen, if that answers your inquiry, why, you may resume your deliberation.

JUROR NO. 3. May I ask a question?

THE COURT. No, I do not want any questions unless it is the question of the jury as a whole. If the jury want to ask a question, I shall be delighted to answer it, but I would rather not have

30 questions asked by the jury individually. If you will kindly retire and if, after further consideration and consulting with your fellows a question is to be asked, why, I would prefer to have it come from the jury. At the same time, I will not adhere to what I said just now, that I will not consider a question by an individual juror. If after consulting your fellows, you decide that you want to ask me a question, why, kindly put it in writing and I will attempt to answer it.

40 (The jury retires.)

Judges Charge

THE COURT. In the absence of defendant's counsel, the Court, of its own motion, enters an exception to each and everything the Court said, such exception being in behalf of the defendant.

DALLAS FLANNAGAN,
Judge. 10

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Judges Charge

REQUESTS TO CHARGE

1. You cannot, under the evidence in this case, find the defendant Treficanto guilty of murder in the first degree.
- 10 2. The statute distinctly provides that any person who shall kill either by misadventure or in his or her own defense shall be guiltless and duly acquitted and discharged, and I therefore direct you that if you find that the deceased in this case was killed by misadventure or by the defendant Treficanto in his own defense, you shall bring in a verdict as to the defendant Treficanto of not guilty.
- 20 3. You cannot bring in a verdict of murder in the first degree unless you are satisfied beyond a reasonable doubt, not only that there was an unlawful killing, but that the defendant intended to take the life of the deceased and that the intention was carried into execution wilfully, deliberately and with premeditation.
- 30 4. There are three necessary ingredients for murder in the first degree, to wit, wilful, deliberate and premeditated, and if you find any of these three absent you cannot convict the defendant of murder in the first degree.
5. Manslaughter is where a person kills in the heat of blood or in a sudden transport of passion, or where he proceeds upon a reasonable provocation and without malice.
- 40 6. If you find from the evidence in this case that the defendant Treficanto was assaulted either by the other defendant Caputo or the deceased Tamburro and that he shot in self defense, you must bring in a verdict of not guilty.

Judges Charge

7. The defendant Treficanto was justified in discharging his revolver in self defense if he was assaulted by either of the other two men, and it was necessary for him to defend himself in order to save his life or prevent serious bodily harm.

8. Every reasonable doubt should be decided in favor of the defendant. 10

9. If you are unable to believe the testimony of the State's witnesses to the actual shooting because of their admitted intoxication and you are not satisfied beyond a reasonable doubt as to how the deceased was shot or who shot him your verdict must be one of not guilty.

10. There is no evidence in this case which shows an intent upon the part of the defendant to take the life of Tamburro and you therefore cannot find him guilty of either murder in the first or second degree. 20

11. There is evidence in this case which if believed by you gentlemen of the jury, will permit you to consider a verdict of manslaughter in this case.

12. If you are under a reasonable doubt as to whether the defendant committed murder in the second degree or manslaughter, you must under your oath render a verdict of manslaughter. 30

13. The admitted intoxication of the witnesses produced in behalf of the state, is a matter which you may consider in determining what weight you are to give to their testimony.

15. If, at the time of doing the act, the defendant was so intoxicated that his faculties were prostrated and he was rendered incapable of forming a specific intent to take life, then, although it was no defense for the crime, his offense will thereby be mitigated to murder in the second degree. 40

Judges Charge

14. In passing upon the act and actions of the defendant Treficanto, you, the jury, are not to hold him to the same cool and correct judgment which you are able to form, but you should put yourself in his place and judge his acts by the facts and circumstances by which you find he was surrounded.

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*Stenographer's Certificate*ESSEX COUNTY COURT OF OYER AND
TERMINER

STATE OF NEW JERSEY

v.

Gerardo Treficanto and
Joseph CaputoOn Indictment
No. 422,

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Apr. T. 1928
for Murder.

We, Harold T. Cook and Joseph S. Fishkind, official stenographers of the Essex County Court of Oyer and Terminer, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by us at the trial of the above mentioned case, which trial was held before the Hon. Dallas Flannagan, Presiding Judge of the Essex County Court of Oyer and Terminer in and for the county of Essex, and a jury, on Monday, June 4, Tuesday, June 5, and Wednesday, June 6, 1928, at Newark, New Jersey.

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HAROLD T. COOK,

JOSEPH S. FISHKIND.

Dated August 9, 1928.

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*Court's Certificate of Record*ESSEX COUNTY COURT OF OYER AND
TERMINER

10	STATE OF NEW JERSEY <p style="text-align: center;">v.</p> Gerardo Treficanto and Joseph Caputo.	}	On Indictment No. 422, Apr. T. 1928 for Murder.
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20 I, Dallas Flannagan, Presiding Judge of the Essex County Court of Oyer and Terminer and the Judge who presided over the aforesaid cause, certify that the above printed book contains the entire record of the proceedings had upon the trial of the said cause, and that the same is returned by the plaintiff in error therein with the writ of error bringing up the bill of exceptions signed and sealed in this cause.

DALLAS FLANNAGAN,
Judge.

Dated September, 1928.

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ASSIGNMENTS OF ERROR

NEW JERSEY COURT OF ERRORS
AND APPEALS

 THE STATE OF NEW JERSEY,

Defendant in Error,

vs.

GERARDO TREFICANTO,

 Plaintiff in Error.

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Afterwards, to wit on the return day of the writ of error, before the Court of Errors and Appeals in the last resort in all causes, comes the said Gerardo Treficanto by Harold Simandl his counsel and says that in the record and proceedings aforesaid and also in the matters recited and contained in said bill of exception and also in giving the judgment aforesaid, there is manifest error in this to wit:

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1. That the said Court before whom &c. at and upon the trial of the said issue so joined between the State of New Jersey and the said Gerardo Treficanto erroneously refused to grant said Gerardo Treficanto a severance and separate trial.

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2. That the said Court before who &c. at and upon the trial of the said issue so joined between the State of New Jersey and the said Gerardo Treficanto erroneously refused to permit the witness John Sylvestro, on behalf of the defendant to be asked and answer the following:

Q. Did he have a conversation with you about Joe Caputo? A. Yes.

Q Did he at that time tell you anything with

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reference to the woman who was working for him being in Caputo's apartment?

Mr. Bozza. I object.

Th Court. Sustained.

(Exception sealed).

10 3. That the said Court before whom &c. at and upon the trial of the said issue so joined between the State of New Jersey and the said Gerardo Treficanto erroneously refused to permit the witness John Sylvestro on behalf of the defendant to be asked and answer the following:

Q Did Treficanto at that time say anything to you about going to the police and making a complaint against the defendant Caputo?

Mr. Bozza. I object.

20 The Court. Sustained.

(Exception sealed.)

4. That the said Court before whom &c. at and upon the trial of the said issue so joined between the State of New Jersey and the said Gerardo Treficanto erroneously refused to permit the witness John Sylvestro on behalf of the defendant to be asked and answer the following:

30 Q. Will you tell me everything that Treficanto said to you that afternoon?

Mr. Bozza. I object.

The Court. Sustained.

(Exception sealed.)

40 5. That the said Court before whom &c. at and upon the trial of the said issue so joined between the State of New Jersey and the said Gerardo Treficanto erroneously refused to permit the witness John Sylvestro on behalf of the defendant to be asked and answer the following:

Q After you had a conversation with Treficanto did you advise him not to make a complaint to the Police Department?

Mr. Bozza. I object.
The Court. Sustained.

(Exception sealed.)

6. That the said Court before whom &c. at and upon the trial of the said issue so joined between the State of New Jersey and said Gerardo Treficanto erroneously charged the jury as follows: 10

“You must remember that the position of Caputo was a very different one from that of this defendant Treficanto”.

7. That the said Court before whom &c at and upon the trial of the said issue so joined between the State of New Jersey and said Gerardo Treficanto erroneously charged the jury as follows: 20

“* * this was in his castle, and I have ruled that what he did was in the protection of it and therefore, he must be find not guilty”.

8. That the said Court before whom &c. at and upon the trial of the said issue so joined between the State of New Jersey and said Gerardo Treficanto erroneously charged the jury as follows:

The provocation under such circumstances is of no value as a defense. The provocation as defense has no value to the defendant except in the consideration of the degree of murder and consideration of the question of whether or not the jury will recommend imprisonment for life or, as it is commonly termed, mercy. 30

9. That the said Court before whom &c. at and upon the trial of the said issue so joined between the State of New Jersey and said Gerardo 40

Treficanto erroneously charged the jury as follows:

If you find beyond a reasonable doubt the defendant prepared for and provoked the affray, he cannot set up successfully a plea of self defense. Such a defense is not open to him.

10 10. That the said Court before whom &c. at and upon the trial of the said issue so joined between the State of New Jersey and said Gerardo Treficanto erroneously charged the jury as follows:

 * * *if the defendant's faculties were so prostrated by intoxication that he could not form this intent, then, of course, he could not form it to such extent as it may be essential in any crime and it is absent because he could not form it by virtue of intoxication, of course, there can be no conviction of that crime or degree of crime.

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11. That the said Court before whom &c. at and upon the trial of the said issue so joined between the State of New Jersey and the said Gerardo Treficanto erroneously charged the jury as follows:

But, if the defendant Treficanto shot and killed Tamburro in an attempt and with the intent to kill Caputo and the attempt was willfull, deliberate and with premeditation, then he is guilty of murder in the first degree.

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Wherefore, the said Gerardo Treficanto prays that the said judgment and sentence may be reversed and annulled and altogether held for nothing, and that he may be restored to all which he has lost by occasion thereof.

HAROLD SIMANDL,
Of Counsel with Plaintiff
in Error.

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REASON FOR REVERSAL

NEW JERSEY COURT OF ERRORS
AND APPEALS

THE STATE OF NEW JERSEY, Defendant in Error, vs. GERARDO TREFICANTO, Plaintiff in Error.	}	
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And now comes the said Gerardo Treficanto by Harold Simandl his counsel, and says that in the record and proceedings aforesaid and also in the matters recited and contained in the said writ of exceptions and also in giving the verdict and judgment aforesaid there is manifest error, and the said Gerardo Treficanto says that said judgment should be reversed and assigns the following reasons or causes:

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1. Because the trial court erroneously refused to grant said Gerardo Treficanto a severance and separate trial.

2. Because the trial court erroneously refused to permit the witness John Sylvestro to be asked and answer the following:

Q Did he at that time tell you anything with reference to the woman who was working for him being in Caputo's apartment?

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Q Did Treficanto at that time say anything to you about going to the police and making a complaint against the defendant Caputo?

Q Will you tell me everything that Treficanto said to you that afternoon?

Q After you had a conversation with Treficanto did you advise him not to make a complaint to the police department?

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3. Because the Trial Court erroneously charged the jury as follows:

“You must remember that the position of Caputo was a very different one from that of this defendant Treficanto”.

10 4. Because the trial court erroneously charge the jury as follows:

**this was in his castle, and I have ruled that what he did was in the protection of it and therefore, he must be find not guilty.

5. Because the trial court erroneously charged the jury as follows:

20 The provocation under such circumstances is of no value as a defense. The provocation as a defense has no value to the defendant except in the consideration of the degree of murder and consideration of the question of whether or not the jury will recommend imprisonment for life or as it is commonly termed, mercy.

6. Because the trial court erroneously charged the jury as follows:

30 If you find beyond a reasonable doubt the defendant prepared for and provoked the affray, he cannot set up successfully a plea of self defense. Such a defense is not open to him.

7. Because the trial court erroneously charged the jury as follows:

40 *** If the defendant's faculties were so prostrated by intoxication that he could not form this intent, then, of course he could not form it to such extent as it may be essential in any crime and it is absent because he could not form it by virtue of intoxication, of course, there can be no conviction of that crime or degree of crime.

8. Because the trial court erroneously charged the jury as follows:

But, if the defendant Treficanto shot and killed Tamburro in an attempt and with the intent to kill Caputo and the attempt was wilful, deliberate and with premeditation, then he is guilty of murder in the first degree.

9. Because the trial court in his charge to the jury unduly emphasized and gave undue prominence to the question of whether or not the defendant provoked the affray.

10. Because the verdict is against the weight of the evidence.

Wherefore, because of the aforesaid reasons or some of them constitute error prejudicial to the said Gerardo Treficanto and he prays that the said judgment and sentence be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion thereof.

HAROLD SIMANDL,
Of Counsel with Plaintiff
in Error.

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NEW JERSEY COURT OF ERRORS
AND APPEALS

STATE OF NEW JERSEY,
Defendant-in-Error,
vs.
GERARDO TREFICANTO,
Plaintiff-in-Error.

In Error

BRIEF OF
PLAINTIFF-
IN-ERROR.

STATEMENT UNDER THE RULES

Gerardo Treficanto was indicted with one Joseph Caputo, that they on the tenth day of March, 1928, at the City of Newark did wilfully, feloniously and of their malice aforethought kill and murder Ammiello Tamburro. The trial proceeded in

ADDENDA

After the words "Ammiello Tamburro", and before the words, "The trial proceeded", insert:

The State contended that Tamburro was killed as the result of a conflict in which Caputo and Treficanto were engaged, which took place in the apartment of Caputo.

THE VERDICT IS AGAINST THE WEIGHT
OF EVIDENCE.

Although the record appears voluminous, much of it sheds no light upon the facts of the actual killing. The evidence discloses that the killing took place in the apartment of Joseph Caputo and there were present at the time no more than the

NEW JERSEY COURT OF ERRORS
AND APPEALS

STATE OF NEW JERSEY, <i>Defendant-in-Error,</i> vs. GERARDO TREFICANTO, <i>Plaintiff-in-Error.</i>	}	In Error BRIEF OF PLAINTIFF- IN-ERROR.
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STATEMENT UNDER THE RULES

Gerardo Treficanto was indicted with one Joseph Caputo, that they on the tenth day of March, 1928, at the City of Newark did wilfully, feloniously and of their malice aforethought kill and murder Ammiello Tamburro. The trial proceeded in the Essex County Court of Oyer and Terminer and Honorable Dallas Flannagan presided. At the close of the evidence, on application of counsel for Joseph Caputo a verdict of acquittal was directed in favor of Caputo. The trial proceeded against Treficanto alone, whereupon the jury returned a verdict of guilty of murder in the first degree and recommended life imprisonment. A writ of error was sued out to review the judgment entered on said verdict. The entire record of the proceedings had upon the trial have been returned with the writ.

Point I.

**THE VERDICT IS AGAINST THE WEIGHT
OF EVIDENCE.**

Although the record appears voluminous, much of it sheds no light upon the facts of the actual killing. The evidence discloses that the killing took place in the apartment of Joseph Caputo and there were present at the time no more than the

following persons, i.e.; Joseph Caputo, Gerardo Treficanto, Tamburro, deceased, Laura Smith, Louise Waldron, Mary Brennan, John Sylvestro. The following testified at the trial: Treficanto, Laura Smith, Louise Waldron, Mary Brennan and Sylvestro. Caputo did not testify.

Caputo lived in a two room apartment in the rear of premises No. 72 Hayes Street, Newark, N. J., which consisted of a kitchen and bedroom, each approximately nine feet square. In order to enter the apartment, one was compelled to use a door which lead from a hallway into his kitchen. The kitchen contained an ordinary cooking stove, sink, table and chairs, an ice box and a kitchen closet. The bedroom contained a bed and trunk. On the opposite side of the hall on the same floor, the plaintiff-in-error, Treficanto, occupied an apartment exactly the same as the one occupied by Caputo.

An autopsy disclosed that the deceased received three bullet wounds, two had been inflicted by twenty-two calibre lead bullets and one by a thirty-two calibre bullet.

The tenth day of March, 1928 fell on a Saturday. On the day before, Laura Smith came from New York City to Newark. She vaguely states she came to get clothes at Joseph Caputo's house. The truth is, she went to a restaurant in Newark and there met the deceased, Tamburro, whom she accompanied to Caputo's apartment and there met Caputo, where they stayed awhile and returned to the restaurant remaining until two A. M. on the following morning. Caputo, Tamburro and Laura Smith left the restaurant and returned to Caputo's apartment. While she admits *she was not sober*, she states she did not fall asleep and sat in the chair all that morning with all her clothes on

until Mary Brennan arrived at the apartment about noon. Mary Brennan however, says that she got to Caputo's apartment at about noon and she found Laura Smith in bed undressed and drunk, and that Laura Smith partly dressed herself and called for a drink of whiskey and they all commenced to eat and drink wine and whiskey. Louise Waldron had been working in the apartment of Treficanto and she too came into the apartment of Caputo and had a sandwich and drinks of whiskey and wine. Treficanto called Louise Waldron, who did not leave the party. Thereupon, he came into the Caputo apartment and threw Louise Waldron's coat and fur upon her lap and slapped her and went out. He did not return immediately. From this point on, Treficanto's explanation of what transpired is in nowise contradicted by any of the women who *were present*. He said he was threatened by Caputo, who said "I will let you spill blood in my home." He then intended to go to the Police Station and get an officer and have them all arrested, but was dissuaded from doing so by Sylvestro. He drank in Caputo's house about five glasses of wine until about eight o'clock when Caputo brought Mary Brennan into Treficanto's room, who created a disturbance, and when he, Treficanto, went to complain to Caputo about the disturbance, Treficanto says: "He was drunk and he punched me here (indicating) and as I heard bang, bang, two shots, then I fell on the floor and as I did I pulled out my gun, a twenty-two and I shot twice on the floor. Then Mary Brennan came from my room to Caputo's room and then as I got from the floor I shot twice in the air." And again he says in answer to the Court's question:

Q Were you punched in the head how many times?

A Two times; we were all drunk; I do not

remember myself.

Q Were you shot in the head?

A I was drunk, sure I was shot. I heard the shots, bang, bang, bang.

Q How many times were you shot in the head?

A I was drunk, twice in the head and then I was punched.

The Court: Twice in the head were you shot?

Witness: I shot after I was hit.

Although the women who testified were unable to say whether Treficanto was injured or not, the police officers found him covered with blood, and his condition is described by the doctor who examined him about three hours later in the City Hospital as follows: "I found a three inch laceration in the right parietal scalp and 'U' shape laceration in the occipital region in the back." The doctor stated in his opinion that these wounds were caused by a blunt instrument. The wounds required three sutures in each laceration. The doctor found that he had a marked alcoholic odor on his breath. Every witness in behalf of the State was fully under the influence of intoxicating liquor. This is gained from their own admissions, as well as the description of each of their conditions as it appears in the testimony. Let us take for instance Laura Smith, a witness in behalf of the State. She admits she was drunk the night before and did not sleep all that night and states of herself:

Q What time did you go on the bed?

A Well, I didn't have any sleep the night before.

Q At that time were you drunk or sober?

A Well, I was not sober.

Q Would you say you were drunk?

A *Well, more than likely.*

Q Isn't it a fact that when Mary Brennan came there you were in Joe Caputo's bed?

A I was not. I was in the kitchen when Mary Brennan came.

Q Now, when you decided to go to bed, were you put to bed by Joe Caputo?

A No. Joe took me by the arm and said "Why don't you lie down" and I laid down.

Mary Brennan describes the condition of Laura Smith as follows:

Q Now, was he doing anything when you came in there?

A No, he was sitting there.

Q What was Laura Smith doing?

A *Laura Smith was in bed.*

Q Now, while Tamburro was cooking and Caputo was out, what were you doing?

A I was sitting on the chair at the end of the table, and *Laura Smith* got up and got dressed and she asked the man for a drink, and the man who got shot went to the kitchen closet and got out a jar of whiskey.

On cross-examination:

Q And so was everybody else drunk?

A Yes, sir.

Q And in fact, Laura Smith was put to bed by Joe Caputo because she was so drunk she could not stand up, isn't that a fact?

A Yes, sir.

Q Now, when you came there she got up and dressed herself, didn't she?

A Yes, sir.

Q Was she drunk at that time or sober?

A Partly drunk.

Louise Waldron describes Laura Smith's condition as follows:

A Well, Laura Smith went to bed; she threw herself on the floor and Mary Brennan and I wanted to pick her up and put her to bed and she told us that Joe would put her to bed and Joe picked her up and put her to bed * * * * *.

Q And Laura was drunk?

A Yes, sir.

Q So drunk that she had to be put to bed?

A No, I went to bed myself.

Q I am talking about Laura.

A Oh, why, Laura, yes, sir.

Again let us consider the condition of Mary Brennan, who admits of herself:

Q Did you get drunk?

A I had some.

Q Were you intoxicated or weren't you.

A I had enough.

Q Were you intoxicated or weren't you?

A Yes, sir.

Q *As a matter of fact, you were staggering all around there, weren't you?*

A *Yes, sir.*

Q And to the best of your recollection, you don't remember whether you went into Treficanto's apartment or not?

A No, sir, I don't remember.

Q You might have gone there, but you don't recall?

A I don't remember.

Q And everybody in the place was drinking wine and whiskey weren't they?

A Yes, sir.

Q Didn't you tell me a half a dozen times—not that—that is exaggerated. Didn't you tell me twice that you were so intoxicated

that you might have been sleeping in Jerry's apartment?

A No, I didn't say I might have been sleeping in Jerry's apartment.

Q What did you say?

A *I said I might have been there.*

Take the condition of Louise Waldron who admits of herself:

* * * * * I got kind of sick from the drink and I laid down behind her for a couple of hours * * * * *

Laura Smith says of Louise Waldron: "she was as drunk as I was."

Mary Brennan says:

Q Then Louise Waldron started to drink wine didn't she?

A Yes, sir.

Q And then she started to drink whiskey didn't she?

A Yes, sir.

To further emphasize the unreliability of their testimony let me point out that while Laura Smith insisted she was lying in bed with Louise Waldron in back of her when she heard a quarrel in Italian and a loud thumping noise and that she rolled out of bed and then rose to her feet in time to see the first shot fired, Louise Waldron disagrees with her and says:

Q When the shooting started up Laura got out of bed?

A Not when the shooting was going on.

Q She stayed right in bed there all the time? Did she, until it was all over?

A Yes, sir.

Q And you saw all of this by creeping over Laura and looking over her shoulder, is that right?

A Yes, sir.

Q Don't you know as a matter of fact that Laura fell out of bed when the first shot was fired?

A No, she did not fall out of bed, she wasn't out of bed even when I got out.

Q Don't you know, as a matter of fact that Laura was standing up when all this shooting was going on?

A No, she was not. She was laying down.

Q So if Laura said she was standing up, that is not true, is it?

A No, she was laying down.

Q How long did you hear this quarrel before the first shot was fired?

A Well, I can't tell; only about a few minutes I guess.

Although Mary Brennan insists that she was in the room when the shooting took place, Treficanto states that she rushed into the room after the shooting had started and after he had been struck. She cannot remember whether she was in Treficanto's apartment or not, although she admits she might have been in that apartment. She states she was so drunk *she staggered all around*. A woman's corset was found by the police officers in Treficanto's apartment, as well as a coat which did not belong to Louise Waldron, the fair inference being that it belonged to Mary Brennan.

What took place between the time that the stupified, intoxicated women heard the quarreling and thumping and after some space of time were aroused from their stupor into a realization of what was occurring in the kitchen; only appears in the testimony of Treficanto who was admittedly intoxicated, but nevertheless describes as far as he knows what transpired. How long it took for them to come out of their stupor they are unable to state. The first thing *that they saw* was a revolver

in Treficanto's hands. Whether or not he provoked the quarrel must be left either to conjecture or we must accept Treficanto's explanation, because of his candor, frankness and honesty. Did the jury take this into consideration? I say they could not have done so and it was quite natural for them not to do so under the circumstances which transpired at the trial. Caputo, who was on trial was acquitted by direction of the Court, who in his remarks to the jury in granting the motion of acquittal stated to the jury that he did so because *the facts were that Caputo was defending himself from an armed invasion*. Of course, that statement drew with it the implication that Treficanto was the armed invader. Throughout his charge to the jury, the Trial Court reminded the jury that before they were to accept Treficanto's explanation of self-defense they were to satisfy themselves that he had not armed for and provoked the affray. This proposition of law was called to their attention repeatedly throughout the charge. In view of what had transpired when the verdict of acquittal was directed in favor of Caputo, how could the jury come to any other conclusion than that Treficanto was in fact the armed invader? And not content with that, the Trial Court in its charge stated to the jury that the position of Caputo was different from Treficanto's position, inasmuch as he, Caputo, was defending his castle from an armed invasion, which the Court had found to be a fact and had by reason thereof directed a verdict of acquittal. Thus, notwithstanding the fact that every witness in behalf of the State was in no physical or mental condition (by reason of excess indulgence in liquor) to give a comprehensive and accurate statement of what happened prior to the actual shooting and in spite of the fact that their testimony is replete with inaccuracies and deliberate misstatements, the defendant Treficanto, was

convicted of murder in the first degree. Can this verdict stand in face of the further fact that his testimony after fair analysis is found to be wholly uncontradicted. The judgment is the result of mistake occasioned by the Trial Court who in attempting to render judgment in favor of the defendant, Caputo, so emphatically and definitely portrayed Treficanto as the aggressor and the provoker of the quarrel, that the jury, either out of respect for the Court or fear to further consider the question in the face of such emphatic declaration, did not take into consideration the true merit of the defense as was disclosed by the evidence, but rendered a verdict in accordance with what it deemed was their duty, i.e. to concur with the finding of the Trial Court. The judgment for that reason should be set aside as being against the weight of the evidence.

Point II.

IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO PERMIT SYLVESTRO TO TESTIFY AS TO WHAT HE SAID TO THE DEFENDANT.

ASSIGNMENTS No. 2, 3, 4 and 5.

Treficanto testified that when he was threatened by Caputo, he started for the police station to summon the police, but was persuaded against doing so by Sylvestro.

Sylvestro admitted meeting Treficanto in front of the premises and having a conversation with him. He was asked if he had advised Treficanto not to go to the police station to complain of Caputo. The Court refused to permit the testimony.

This was not a self-serving declaration of the defendant. It was a declaration by a third per-

son to the defendant which was corroborative of the defendant's testimony. By refusing to allow the witness to testify, the defendant was deprived of his legal right to have all competent and relevant testimony in his behalf considered by the jury. This was error, which was harmful to the defendant in his defense upon the merits.

Point III.

IT WAS ERROR FOR THE TRIAL COURT TO CHARGE THE JURY "YOU MUST REMEMBER THAT THE POSITION OF CAPUTO WAS A VERY DIFFERENT ONE FROM THAT OF THIS DEFENDANT, TREFICANTO," AND FURTHER TO SAY TO THE JURY, "* * * * * THIS WAS IN HIS CASTLE AND I HAVE RULED THAT WHAT HE DID WAS IN THE PROTECTION OF IT AND THEREFORE HE MUST BE FOUND NOT GUILTY."

With Caputo out of the case and after Treficanto had testified, it was error for the Court to declare as a fact that the position of Caputo was different from that of Treficanto. By so doing, the Court was not merely commenting upon the evidence, but was invading upon the province of the jury to determine that fact for themselves. The question that the jury had before it for its decision was whether or not Treficanto had fired in self-defense. By the Court thus declaring to the jury as a fact, that the position of Treficanto was different from Caputo, was intimating very strongly that the defendant, Treficanto, was an armed invader and it was necessary for Caputo to protect himself from such an invasion. What other reasonable inference could the jury have obtained from any such language? Treficanto in his testimony had contended that he was lawfully upon the premises and had been attacked by Caputo. When the

Trial Court stated to the jury that what Caputo did was in protection of his castle, what other inference could be drawn from what it said than that Treficanto must have been the armed invader thereof. Such a charge removed from the defendant, Treficanto, the protection which the law gave him, to have all questions of fact and the ultimate question of his guilt determined by the jury upon the facts and not by the Trial Court.

It is respectfully submitted that this charge of the Trial Court was error prejudicial to the defendant in his defense on the merits.

Point IV.

THE TRIAL COURT ERRED IN CHARGING THE JURY: “* * * * IF THE DEFENDANT’S FACULTIES WERE SO PROSTRATED BY INTOXICATION THAT HE COULD NOT FORM THIS INTENT, THEN, OF COURSE, HE COULD NOT FORM IT TO SUCH EXTENT AS IT MAY BE ESSENTIAL IN ANY CRIME AND IT IS ABSENT BECAUSE HE COULD NOT FORM IT BY VIRTUE OF INTOXICATION, OF COURSE, THERE CAN BE NO CONVICTION OF THAT CRIME OR DEGREE OF CRIME.”

In the case of *Wilson v. State*, 60 N. J. L. 171, the rule is laid down:

“If the evidence is sufficient to satisfy the jury that the intoxication of the accused at the time of the homicide was so great as to prostrate his faculties, and render him incapable of forming the specific intent to kill which is the essential ingredient of murder of the first degree, the prisoner will not be entitled to acquittal, but his offense will be murder in the second degree.”

The Trial Court required the jury to find that the faculties of the defendant must have been so prostrated by intoxication that he could not form the intent *necessary to any crime* in order that they might mitigate the degree of the defendant's crime to second degree murder. Such is not the rule as laid down in *Wilson vs. State*, supra, which requires the defendant's faculties to be prostrated by intoxication to such a degree that he could not form a specific intent to take life. While the Trial Court at the request of the defendant did instruct the jury correctly with respect to intoxication, this instruction being inaccurate left the jury with one accurate and one inaccurate instruction on the subject, the inaccurate one not having been withdrawn, under the rule of this Court where such conflict appears there is error.

Point V.

THE TRIAL COURT ERRED IN REFUSING TO GRANT A SEPARATE TRIAL.

The power to grant separate trials upon due application resides in the discretion of the trial court. There is no appeal unless the court has been guilty of an abuse of that discretion. Speaking respectfully, I contend there has been an abuse of discretion, primarily because the facts contained in the bill of particulars disclosed at best an affray between two men whose interests were hostile and antagonistic.

Thus, where the defenses or interests of two or more jointly indicted are antagonistic, separate trials may *and should be allowed*. 16 C. J. para. 2008, page 786. (Italics mine.)

"Where two persons are placed on trial charged jointly with an affray, and one requests a severance, diversity of interests,

hostility and common fairness requires that the request be granted unless public interest demands a joint trial." Frazee vs. State 152, P. 462.

In this case, the defendant has suffered grave harm. By turning to the decision of the Trial Court delivered to the jury upon the motion of Caputo for a directed verdict of acquittal, the court predicates its decision on the ground that the defendant, Caputo, was protecting himself from *an armed invasion*. By implication, Treficanto was the *armed invader*. Again the written confession, S-24 made by Caputo was allowed in evidence and read to the jury. While it was subsequently stricken from the record the jury had heard it. Again the Trial Court in its charge to the jury informed the jury that Caputo's position was different than Treficanto's, in that Caputo was defending his home from an invasion, which the Court found to be *the fact*. Would those facts have been before the jury if his case was tried separately? If the defendant, Treficanto, was not entitled to a separate trial under what circumstance is it possible for a defendant to obtain a separate trial?

The jury witnessed the Trial Court releasing one defendant and were told and reminded that he was being released because he acted in defense of an armed invasion of his home by Treficanto, the other defendant, who defended upon the ground that he was attacked by the defendant who was acquitted. By one sweep, everything in his case, his testimony, the benefit of the reasonable doubt, the presumption of innocence was cast aside by a judicial finding which the jury witnessed and were

informed of, and which they, as laymen, would naturally respect. Did Treficanto have a chance to have his story weighed in the balance of fair impartial minds? I respectfully submit that under the circumstances of this case the failure of the Trial Court to grant a severance amounts to an abuse of judicial discretion.

For the divers reasons herein urged, it is respectfully submitted that the judgment should be reversed and a new trial ordered.

Respectfully submitted,

HAROLD SIMANDL,
Counsel for Plaintiff-in-
Error.

Cozzolino Ptg. Co., 265 Halsey St., Newark, N. J.

NEW JERSEY COURT OF ERRORS AND
APPEALS

State of New Jersey
Defendant-in-Error

v.

Gerardo Treficanto
Plaintiff-in-Error

Statement of the Facts.

The defendant, Gerardo Treficanto, plaintiff-in-error herein, was indicted and tried with one Joseph Caputo, in the Essex County Court of Oyer and Terminer, for the murder of Ammiello Tamburro, committed on March 10, 1928, in Newark, N. J. At the close of the evidence, on motion of counsel for Joseph Caputo, and no objection being raised by counsel for Gerardo Treficanto, a verdict of acquittal was directed in favor of Caputo. Thereafter, upon motion of counsel for Treficanto, all testimony admitted in the case against the defendant Caputo, and the statement admitted in the record as made by Caputo, were stricken out of the record. Treficanto was found guilty of murder in the first degree with a recommendation of life imprisonment. On June 6, 1928, he was sentenced accordingly and on the same day he commenced his term in the State Prison.

A writ of error was sued out to review the judgment of the Trial Court; and the entire record of the proceedings had upon the trial have been returned with the writ.

Argument

The argument of plaintiff-in-error is divided into five points, and we will answer these arguments as they have been advanced by plaintiff-in-error.

POINT I.

Plaintiff-in-error argues that the verdict is

against the weight of the evidence. The verdict is not against the weight of the evidence.

To justify the setting aside of a verdict as against the weight of the evidence, lack of evidence must be so clear as to give rise to an inference that it was the result of mistake, passion or prejudice. *State vs. Grace*, 98 N. J. L., 341.

To determine whether the verdict is against the weight of the evidence, the Court of review weighs the evidence in the same manner as upon a rule to show cause in a Civil Case where the reason assigned is that the verdict is against the weight of the evidence.

State v. Grace, 98 N. J. L. 341.

State v. Morehouse, 97 N. J. L., 285

State v. Fisher, 97 N. J.L., 34.

That the jury could have reached a different conclusion, is not sufficient to set aside the verdict.

"The Court should not set a verdict aside, even, although, in its opinion, the jury might, upon the evidence, have found otherwise."

Queen v. Jennings, 93 N. J. L., 353.

Knickerbocker Ice v. Anderson, 31 N. J. L., 333.

A summary of the facts adduced at the trial supports the conclusion that there was sufficient evidence to go to the jury, and the finding of the jury was justified by the evidence.

The murder in question was committed at about 10:45 P. M. on Saturday, March 10, 1928, at the home of Joseph Caputo, in Newark, N. J.

Caputo and Traficanto lived in two two-room apartments in the rear of premises No. 72 Hayes Street, Newark. Attached to this brief is a plan of the apartments.

Caputo occupied the apartment left of the hallway, that is, the North Apartment, and Treficanto

occupied the one right of the hallway, the South Apartment. Each apartment had a door opening from the hallway into the kitchen, this door being the only entrance to the apartment.

The deceased, Amiellio Tamburro, received three bullet wounds; two of these were inflicted by a 22 calibre lead bullet and one by a 32 calibre steel bullet.

On Friday, immediately preceding the Saturday when the killing occurred, Tamburro, the deceased, accompanied by Laura Smith, went to Joseph Caputo's apartment. There is nothing vague or untruthful in the testimony of Laura Smith in this respect. Her testimony is that on said Friday afternoon she was in a restaurant; upon the request of the proprietor, also of Tamburro, she took Tamburro to Caputo's apartment. She had come from New York to take some clothing from Caputo's house. (p. 70, L. 39; p. 74, L. 33). The three of them, Caputo, Tamburro and Laura Smith went out that night and returned to Caputo's apartment early Saturday morning. (p. 77, L. 19.) About noontime that day, Saturday, March 10, Mary Brennan came. Then they fried some meat and ate and drank. As they were eating and drinking, Louise Waldron came in, and joined the party. Louise Waldron was Treficanto's housekeeper. A few minutes later Treficanto came in and asked Louise to return to him. Louise Waldron promised to return in a little while but did not go over. So Treficanto came back angry, with Waldron's coat and scarf, and threw them upon her lap. (p. 79, L. 10-20) and went out. For sometime Treficanto did not return. During this period the witness, Laura Smith, went to bed with Louise Waldron. About an hour or so later she heard loud talking and thumping voices, and rolled out of bed when she saw Treficanto standing in the hallway and point a revolver at Caputo.

When Treficanto fired the first shot at Caputo the latter was near the stove. After being fired upon, Caputo ran into the bedroom, took his gun and fired one at Treficanto from the door between the kitchen and the bedroom; then Caputo ran to a corner; Treficanto fired toward that corner; then Caputo came back into the bedroom and fired again. Then Treficanto disappeared from the door out into the yard: As he did so witness heard two more shots come through the kitchen window. In all, witness saw Caputo fire two shots, Treficanto fire three shots from the hallway, and she heard two shots come through the kitchen window immediately after Treficanto went out; seven in all.

Mary Brennan testified that she went to Caputo's apartment at about 1:30 P. M., Saturday, March 10. When she got there, Laura Smith, Tamburro and Caputo were there. Then they started to eat and drink; while they were eating Louise Waldron came in and joined them. Then came Treficanto, who asked Louise Waldron to return to his place, and went out. A short time afterwards he came back and again asked Louise Waldron to go back with him. Louise did not go. Treficanto went back and returned with Louise Waldron's scarf and coat and threw them in her lap and left, speaking some loud words in Italian. In about two hours and a half, Treficanto came back, (Here witness was asked if she did not go into Treficanto's apartment with him; witness said she did not remember. Witness evidently did not want to incriminate herself with immoral conduct in Treficanto's apartment) partly opened the door, raised his hand and fired a shot at Caputo. At this time witness was in the kitchen, sitting on a chair at the table; Tamburro was near the ice box and Caputo was near the stove. Being fired upon, Caputo ran into the bedroom and came back to the door, not out of the bedroom,— and he fired

aiming at the kitchen door where Treficanto fired from. (p. 130, L. 10.) Treficanto backed into the hallway and soon thereafter two shots came through the window. During this duel Tamburro was standing near the ice box, between Caputo and Treficanto in the range of fire. Witness did not follow Tamburro's action after the firing of the first shot. (p. 121, L. 14.) When the shots came through the window she hid her head under the sink and did not get out until the shooting was over. Witness heard seven shots in all. After Caputo had fired his shots Tamburro was still standing on the floor, in front of the ice box. (p. 127, L. 24). Evidently, therefore, Tamburro was killed by the last shots of Treficanto. Witness was put through a very thorough cross-examination by Council for Treficanto; her answers disclose that she was telling only what she actually saw and remembered and was not trying to testify to facts as to which her memory was not clear. She admits that she might have been in Treficanto's apartment at one time, but at the time of the shooting she was in Caputo's kitchen.

Witness further testified that at the time of the shooting Treficanto was not struck or wounded; and that he was not bound up with bandages when she saw him at Headquarters.

Louise Waldron, the third woman present at the shooting, testified to the following facts: (p. 148, L. 30, etc.)

For several months past she had been employed by Treficanto to clean his apartment every Saturday, and on Saturday, March 10, the day of the killing, she had gone there for the same purpose. She worked from 10:30 till about 12, noon. She remained there until about 2 P. M., and then went across the hall to Caputo's apartment to meet Laura Smith, because she was told that Lauro Smith could speak German. Laura Smith, Mary

Brennan, Caputo and Tamburro were there, eating and drinking. She joined them. While they were eating and drinking Treficanto came in and asked her to go out, which she said she would do but did not. Treficanto was offered a drink, which he refused, and returned to his apartment. A few minutes later he came back and again asked witness to go over to his apartment. Witness said she would, in a few minutes, and again did not, as she was interested in Laura Smith's company and kept on talking, drinking and eating. Five or six minutes later Treficanto came back with witness' coat and scarf and threw them on her lap and **slapped** her in the face and left. Treficanto was not seen until about two hours later. During these two hours Laura Smith was put to bed, and witness lay down in the same bed, behind Laura Smith. She had been lying there for two hours or so when she heard loud talking, and, raising her head, saw Treficanto with a gun in his hand. Treficanto stood between the kitchen door, the entrance to Caputo's apartment, and the hall, facing Caputo's bedroom, and shot in the direction of Caputo's bedroom door. Upon hearing the first shot, she put her head down and did not see what was going on in the kitchen, but saw Caputo run back of the bed, near the trunk, and stoop down, and then she saw Caputo shoot. When the shooting was over Caputo told the woman to get out of the house, which she immediately did. While getting out, she saw Tamburro lying near the ice box. Witness heard six shots in all. Treficanto fired the first shot. (p. 159, L. 10.)

The State further showed that Treficanto was arrested while escaping from the scene; and a loaded revolver was found upon his person.

When Treficanto was arrested he had injuries on his head, which were bleeding. (p. 181, L. 1).

Treficanto did not state to the police how he got the injury. It is very probable that one of Caputo's shots, fired in reply to those of Treficanto, may have grazed his head. Upon examining Treficanto's apartment, immediately after the shooting, the police found blood spots on his bed sheets. (p. 183, L. 20.)

All the bullets found in the body of Tamburro came from Treficanto's guns. This was not disputed. The gun found in Caputo's apartment was a 32 calibre revolver, using lead bullets. The only 32 calibre bullet removed from deceased's body was a steel jacketed bullet, used in automatic guns, the kind that was found in the bureau in Treficanto's apartment. (p. 183, L. 9.) There were two shells found in the yard in front of the window of Caputo's apartment, where Treficanto fired from as he was going out. Both of these shells were 32 calibre automatic shells. (p. 206-207.)

The bruises on Treficanto's head were similar to any lacerations caused by blunt instrument. Defendant's witness testified it could have been caused by a grazing bullet. (p. 220, L. 39.) And the other wound could have been shaped by a fall.

John Sylvester, for the defendant, testified that he went to Caputo's apartment at about 6 P. M., and remained there only a moment, and departed.

Treficanto, the plaintiff-in-error, testified that on the day in question, Louise Waldron did some cleaning for him; that Louise went across the hall to Caputo's apartment and that he went to call her back at about 1:00 o'clock; that Louise said, "Wait a minute." He went there a second time, about an hour later and called her again. Again she said "Wait a minute", but did not go

over. For the third time, at 4 o'clock, he called Louise over to cook. Finding that she had not returned, he complained to one Buccino, saying: "I lost the boss; she ran away," (p. 228, L. 12.) clearly indicating that he was jealous and angry for the fact that Louise had apparently forsaken him. He went over and called Louise again. Louise refused. He thereupon slapped her. Here Caputo arose and said, according to Treficanto's testimony, "In my house I don't want you to do this." "I will **not** let you spill blood in my house." Counsel for plaintiff-in-error, on page 3 of his brief, grossly misstates the testimony stating that Caputo threatened Treficanto and said to him: "I will let you spill blood in my house," whereas, in fact, as testified to by Treficanto, the plaintiff in error, Caputo said, "I will **not** let you spill blood in my house." (p. 228, L. 29.)

After these words of Caputo, which contained no threat at all, Treficanto went back to his rooms. Then he thought of having Caputo and his guests arrested. (p. 229, L. 8.) Why? Simply because he was jealous, because Louise Waldron would not come to him. On his way out to call the police he met Sylvestro, who took him to his house. Thereafter, accompanied by Amiello and one Giovanni, Treficanto went to his house. Here he said to Giovanni, "See my woman that does the cleaning; she clean the house and clean the stove and everything, and now she left me", showing that he was burning with jealousy. That Caputo did not desire to fight over the woman is evident from the following testimony of Treficanto. (p. 231, L. 31, etc.)

Then Caputo said, "Gerardo, on account of the woman we going to kill each other?" (Note the question mark, indicating that Caputo considered such an idea a silly one.

Caputo again said, (p. 232, L. 11) "They are like the wind, today they are in my house, tomorrow they are in your house, and some other day they are in somebody else's house", clearly indicating that Caputo did not think it worth while to fight over women.

Then they went to Caputo's house and drank some wine. Treficanto drank three small and two large glasses of wine, only; an amount not sufficient to intoxicate a man of Treficanto's type accustomed as he is to wine.

Then Treficanto returned to his room. A few minutes later Caputo brought Mary Brennan to his room and left her there. Mary Brennan created a disturbance. He went to Caputo's apartment, with a loaded revolver in his pocket, and complained of Mary's conduct. Then, he says, he was punched twice, and then he fired.

On cross examination he testified that he put his gun in his pocket when Louise Waldron refused to return to him, and Caputo told him not to cause any disturbance in his house. (p. 240.)

Treficanto did not return to his room until he got Mary Brennan, one of the women, to go with him. (p. 246, L. 15, etc.) Soon after Mary Brennan was calling for help. It can easily be surmised, as to what was going on.

Did Treficanto go to Caputo for the innocent purpose of calling him over? Did Caputo strike him without provocation? Caputo did not touch him when he threatened to go to the police. Caputo laid no hands on him when talking about killing each other over women. In fact, Caputo invited him to a drink. But when he went to inform Caputo that Mary was causing a disturbance, Caputo struck him!!! No jury could believe that, especially after considering the fact that Treficanto

went to Caputo's rooms, after the disturbance by Mary, with a loaded gun in his pocket. (p. 248, L. 10.)

Treficanto says when he went to Caputo's apartment to complain of Mary's conduct Laura Smith was standing near the ice box (p. 249, L. 12.) All other witnesses testify that Smith was in bed at the time. (p. 79, L. 40; p. 122, L. 23; p. 153, L. 2.)

Treficanto admits that Caputo had no gun at the time he, Treficanto, fired the shots. (p. 250, L. 12, etc.) The fact is, that Treficanto shot at Caputo; Caputo ran into the bedroom, took his gun and fired back. After shooting with the revolver and the automatic, Treficanto went back to his room, left those two guns there and picked up a fully loaded revolver, put that in his pocket and went out into the street, where he was arrested. He testified that he took his gun with him as a protection in case Caputo attacked him upon his return. The fact is he took that gun for some more fighting. When asked if he had ever been convicted of crime, the defendant wilfully lied and did not admit it until he was confronted with the record of his conviction. (p. 257, L. 10, etc.)

It is admitted that all the witnesses had had drinks and their memory of the incident was not all too clear, but there was more than sufficient testimony which was coherent and corroborative of each other, so that the jury's verdict was more than sufficient. What contradictions there are, are on minor and insignificant points. There is no contradiction of the essential part of the incident; that is, that Treficanto came to Caputo's rooms several times and asked Louise Waldron to go to his rooms, and upon her failure to do so, slapped her in the face. Caputo told him not to cause

trouble in his house and not to spill blood there. Treficanto went back to his rooms, put a loaded gun in his pocket and came to Caputo's apartment, took Mary Brennan back with him, had a quarrel with her, when Brennan called for help. Treficanto came back to Caputo's apartment with a loaded revolver in his pocket; a quarrel ensued. Caputo, all this while, had no gun. Treficanto first fired at Caputo and then Caputo ran to his bedroom, and from within his bedroom fired back at Treficanto. Treficanto returned to his room, took another gun, came back and fired some more.

Treficanto's statement that he fired when he heard two shots is an afterthought, and evidently the jury thought so.

Treficanto's testimony on this point is as follows: (p. 250, L. 22.)

"Q. Did you see anybody fire those two shots that struck you?

"A. No, sir, I did not see anybody.

"Q. Did Tamburro shoot you?

"A. I didn't see it.

"Q. Did Caputo shoot you?

"A. I did not see it, Caputo punched me."

In all there were seven shots fired; three by Caputo and four by Treficanto. Caputo had no gun when Treficanto first fired upon him. It is clear, therefore, that Treficanto shot first, and this is strongly corroborated by the testimony of all the women present.

Whether or not Treficanto was the provoker was not a matter of conjecture. Treficanto's own testimony discloses the fact that he was enraged by Louise Waldron's refusal to come to him and

he went to Caputo's apartment, armed, and unsatisfied with the woman Caputo had allowed him to have. The evidence conclusively establishes that Treficanto was the armed invader of Caputo's home.

Treficanto's own testimony was replete with contradictions. He denied ever having been convicted until confronted with his record. He said that at the time of shooting Laura Smith was in the kitchen, while in fact she was in the bedroom. He denied that he fired any shots from the outside, (p. 251, L. 15.) whereas the testimony of the women, and of the detectives who found shells from his gun in the yard, proved beyond doubt that he fired from the yard also. He denied ever having used the automatic, and it remains undisputed that one of the fatal bullets came from his automatic. He said he was too drunk at the time to remember just what happened, yet he coolly returned to his room after the incident, left his used guns in the bureau, took a fully loaded one with him and started to go to Buccino's, intending to return at 1:00 A. M., and reasoning that he would need the gun for protection in case of further fighting.

The jury heard his testimony and saw his conduct during cross-examination; as when, instead of answering the question he began to swear, or give irrelevant answers. (p. 248, L. 34; p. 249, L. 18.) The jury had the right to determine what credit to give to his testimony.

It is apparent, therefore, that there was ample evidence to justify the verdict of the jury.

It is an elementary rule that where there is evidence from which the jury might properly find the defendant guilty, the issue is one for the determination of the jury, and the Court will refuse to direct a verdict of acquittal on the ground

that there was no evidence of the defendant's guilt. On considering the sufficiency of the evidence, its competency is not to be weighed.

State v. Krupin, 100 N. J. L. 7; 101 N. J. L., 228.

State v. Morehouse, 97, N. J. L., 285.

It is submitted, therefore, that the verdict was not against the weight of the evidence.

POINT II.

It is not clear just what part of the testimony, or the rejection of what evidence, is attempted to be argued by counsel for plaintiff-in-error under this point. According to Rules of this Court, when the error alleged is the admission or the rejection of evidence, the specification shall quote the substance of the evidence admitted or rejected. This refers to the brief of the plaintiff-in-error. Rule 35 b. par. (2).

It is held in **Capuccio v. Hammonton, etc.**, 98 N. J. L. 6, that a contention against instructions argued perfunctorily, but failing to point the particular part containing alleged errors, is not before the appeal Court.

The same rule applies to alleged error in the admission or rejection of evidence. The testimony rejected by the court should be set forth in the brief. **Bowers v. State Highway Comm.**, 5 N. J. Misc. Rep. 10, Unofficial report.

However, taking the facts as stated by plaintiff-in-error, there was no injury done to the plaintiff-in-error because the purpose of the rejected testimony was accomplished, and the facts sought to be proved were, in effect, testified to. The admitted purpose of the rejected testimony was to show that defendant was dissuaded from going to the police station. This was sufficiently brought

out in the following testimony of the same witness, (p. 223, L. 28, etc.)

“Q. After your conversation with Treficanto where did you go with Treficanto?”

“A. He came to my house.”

It is urged by plaintiff-in-error that the rejected testimony was corroborative of defendant's testimony. It suffices to point out that at the time the testimony in question was introduced the defendant had not yet taken the stand.

The facts sought to be proved, that defendant was dissuaded by Sylvester from calling the police, was again testified to by the defendant on direct examination, (p. 229, L. 3.)

“O. Then what happened?”

“A. Then I said “Goodbye” and then I said to myself, ‘I will go to the police station and get an officer and have them all arrested’.

“Q. Well, did you go to the police station?”

“A. No, sir.

“Q. Well, what prevented you?”

“A. I met Annello on the street and he asked me where I was going.

“Q. Is that the man who just testified on the stand before you?”

“A. Yes, sir.

“Q. Go ahead and tell us what happened after you had the conversation with Annello.

“A. (Not answered.)

“Q. After you went to Annello's house, where did you go then?”

This showed that upon meeting Annello (Sylvestro) defendant was prevented by Annello from going to the police, and accompanied Annello to the latter's house.

Where the alleged error is improper exclusion of evidence, and it appears that substantially the same facts were adduced, the exclusion of the evidence will not lead to a reversal.

This is the rule of *Spence v. Hutchinson*, 102 N. J. L., 131.

Auer v. Sinclair Ref. Co., 103 N. J. L., 372.

Diemer v. Shepard, 6 N. J. Misc. Rep. 186, unofficial.

Plaintiff in error fails to show in what respect the rejection of the evidence was prejudicial to defendant on the merits. The rejection of the testimony in question is, therefore, no ground for reversal.

Kargman v. Carlo, 85 N. J. L., 632.

Spence v. Hutchinson, *supra*.

State v. Scott, 6 N. J. Adv. Rep., 864.

Aside from being harmless, the rejection of the evidence was proper. The underlying purpose of the questions and the expected answers were to create the impression that some crime was being committed in Caputo's house, necessitating Treficanto's calling the police. The purpose was to incriminate Caputo by hearsay evidence. This becomes very clear when we consider the several questions in the order asked. (p.p. 221, 222.)

"Q. Did he have a conversation with you about Joe Caputo? A. Yes."

Witness continued speaking in Italian but same

was not interpreted. Over Prosecutor's objections, the Court allowed the answer 'Yes', but not the details of the conversation.

"Q. Did he at that time tell you anything with reference to the woman who was working for him being in Caputo's apartment?"

"Q. Did Treficanto at that time say anything to you about going to the police and making a complaint against the defendant Caputo?"

It is evident that this was an attempt to bring out self-serving statements made by the defendant Treficanto to Sylvestro, which were, at the same time, purely hearsay, so far as Caputo was concerned.

There was, therefore, no error in the rejection of the testimony.

POINT III.

The following portions of the charge are argued under this point:

A. "You must remember that the position of Caputo was a very different one from that of this defendant, Treficanto."

A. "This was in his castle and I have ruled that what he did was in the protection of it and therefore he must be found not guilty."

These were not only mere comments on the testimony, but they were true statements of facts.

It is not disputed or argued by plaintiff in error that the position of each defendant was not different from that of the other.

As to the second portion, again it was a true statement of facts. The Court is merely stating the fact that he, the Court, directed a verdict

of not guilty for Caputo. Plaintiff in error does not claim that it was error to direct a verdict of acquittal for Caputo.

The Court having properly directed a verdict of acquittal, it was no error to state that he had so ruled. The fact stated by the Court is not that Caputo was acting in self-defense or in defense of his home, but that he, the Court, made a certain ruling during the trial, which he did.

Even if we were to give the language of the Court the interpretation which plaintiff-in-error attempts to give, that Caputo was acting in protection of his home, the Court was merely stating his view of the evidence and in no way imposed upon the jury to take that in preference to their own. The question whether or not Treficanto had fired in self-defense was never taken from the jury. This is evident from the following excerpts from the charge:

"If you find from the evidence in this case that the defendant Treficanto was assaulted either by the other defendant Caputo or the deceased, Tamburro, and that he shot in self-defense, you must bring in a verdict of not guilty." Case p. 269, L. 10.

"The defendant Treficanto was justified in discharging his revolver in self-defense if he was assaulted by either of the other two men, and it was necessary for him to defend himself in order to save his life or prevent serious bodily harm." Case p. 269, L. 39, etc.

"As I recall it, the State's witnesses, those who were in that room, all agree, but you must not take my viewpoint unless it agrees with your recollection, that this defendant Treficanto came to that doorway to Caputo's apartment and began to shoot at Caputo." Case pp. 272, L. 11-16.

“Second, the Court, has no power to decide or to instruct the jury how to decide any question of fact, but the jury are the sole and final judges of the facts, the weight of testimony and other evidence, the credibility of witnesses, inferences to be drawn from the evidence, and of all issues and questions of fact whatever, including the ultimate conclusion of guilty or not guilty, as well as the degree of guilt, if any, to be reached upon all of the evidence in the case. As judges of the facts it is their function, responsibility and duty to recollect what the evidence is and all the evidence, the appearances during the trial, the appearance and conduct of the witnesses, whether evidence is or is not in the case and whether it is disputed or undisputed and to be controlled by their own recollection alone in all such matters. If the Court should at any time make any statements of its recollection or should even go further and make definite affirmations, no matter how positive with regard to any of such matters, it is the duty of the jury to disregard such expressions of the Court, except where the same coincide with their own recollection.” Case p. 264, L. 13-37.

“* * * but the jury are not bound by any such expression (of opinion by the Court) and may disregard any or all of such expressions if it sees fit.” Case p. 265, L. 10-13.

“* * * if you find that the deceased was killed by misadventure or by the defendant Treficanto in his own defense, you shall bring in a verdict as to the defendant Treficanto of not guilty.” Case p. 266, L. 25-29.

After so strongly emphasizing that the jury must depend on their own version of the facts

and not the opinions expressed by the Court, and after repeatedly instructing the jury to acquit defendant Treficanto if they found that he acted in self-defense, it is inconceivable how the Court's charge could be construed to have invaded the province of the jury to determine the facts for themselves.

Even if the Court did express an opinion, which he did not impose upon the jury, that Caputo was acting in defense of his home, this was clearly sustained by undisputed evidence. Caputo had no gun at the time the fight commenced. Treficanto came to Caputo's door with a loaded gun in his pocket. Caputo retreated to his bedroom. Treficanto, after firing a few shots, went back to his room, discarded the old gun, took another one, fully loaded, came out and shot again. These are uncontradicted, and in fact, admitted facts.

It is submitted therefore, that the statement of the Court was as to a step in the proceedings and not as to whether Treficanto was acting in self-defense, or not. Even if we assume that it was an opinion concerning Treficanto's action, it was a correct statement, and therefore no error.

State v. Scott, 6 N. J. Adv. Rep., 864.

Not only did the Court not invade the province of the jury, he most emphatically urged them to depend on their own deductions and conclusions, as the sole judges of the facts.

It is respectfully submitted that there was no error in the charge of the Court.

POINT IV.

Plaintiff-in-error argues that the court's charge concerning the effect of intoxication was error, and

quotes only an incomplete sentence from the charge.

The following is the charge of the Court on the question:

"If at the time of doing the act, the defendant was so intoxicated that his faculties were prostrated and he was rendered incapable of forming a specific intent to take life, then, although it was no defense for the crime, his offense will thereby be mitigated to murder in the second degree. So I charge you."

"You will find that the question of intent enters in a very important way into this case, and as that charge has already stated, if the defendant's faculties were so prostrated by intoxication that he could not form **this** intent, then, of course, he could not form it to such extent as it may be essential in any crime and it is absent because he could not form it by virtue of intoxication, of course, there can be no conviction of that crime or degree of crime."

There is no error in this: The charge is perfectly in accord with the case of *Wilson v. State*, 60 N. J. L., 171, cited by plaintiff in error.

This is not the case of the charge containing one correct and one erroneous statement of the law. The second paragraph must necessarily be construed in the light of the first, because it refers to the first paragraph by the words, "As that charge has already stated." And then again, the second paragraph speaks of "**This intent**". What intent? The specific intent to take life, as given in the first paragraph.

Even when taken alone, the second paragraph, the portion assigned for error, is not error, because does not require the jury to find that the

faculties of the defendant must have been so prostrated by intoxication that he could not form the intent necessary to any crime. The instruction merely states that if a person, by reason of intoxication, has his faculties so prostrated that he cannot form the specific intent essential in any crime or degree of crime, then he cannot be convicted of **that** crime or degree of crime.

Therefore, taken alone, or taken in conjunction with the preceding paragraph, the charge stated the correct rule of law.

“The ultimate test of soundness of instructions is, not what the ingenuity of counsel can, at leisure, work out the instructions to mean, but how and in what sense, under the evidence before them and the circumstances of the trial, would ordinary men and jurors understand the instructions as a whole. *State v. Pitman*, 99 N. J. L. 626, 12, A. 597, judgment affirmed 124 A. 926.

“Assignment of error directed to portion of a charge severed from its contents is unavailing, where, on consideration of the charge, as a whole no error appears. *State v. Giberson*, 122 A. 724, 99 N. J. L. 85.” *State v. Randall*, 95 N. J. L. 452.

It is not even claimed by plaintiff in error that the charge injured the defendant's cause. It could not have, since there was no evidence to show that defendant's faculties were prostrated by drinking. He had three small and two large glasses of wine;—no whiskey,—just enough to inflame him into action.

It is submitted therefore, that the court gave the proper rule on the question of the effect of intoxication, and there was no error, and no ground for reversal of the judgment.

POINT V.

There was no error in refusing separate trials, and plaintiff in error has suffered no injury as a result of such refusal.

The court's decision to direct a verdict of not guilty for Caputo affected Caputo only, and the jury were specifically instructed not to be guided by that in determining whether Treficanto acted in self-defense or not. These were questions of fact and they were left with the jury.

The comments on the evidence made by the Court in his charge, the version of the incident given by the Court as to whether Caputo acted in defense of his home, or whether Treficanto acted in self-defense, could just as properly have been made if the plaintiff in error, Treficanto, had been tried separately. In fact, at the time the Court charged the jury, Caputo was out of the case, so that the charge was given exactly the same as if Treficanto had a separate trial. It is not claimed by plaintiff-in-error that certain witnesses were allowed to testify who would not have qualified had a severance been granted; or that any witnesses were precluded from testifying by reason of the refusal of a severance; or that plaintiff in error was unable to introduce any evidence because a severance was refused. The only evidence admitted, which would not have been admitted had a severance been granted, was the statement of Caputo, and as to this, both at the time it was admitted and at the time Caputo was subsequently acquitted, the Court in very clear language, instructed the jury that it is not binding on the defendant Treficanto.

P. 215, L. 14:

"The Court. The jury is instructed that this

statement is not binding upon the other defendant and only binding on the defendant who made it."

L. 34, same page: "I have already instructed the jury and I will reiterate that this statement is not binding, has no binding effect whatever upon any one except the man who made it, and, as far as the other defendant is concerned, it is to be disregarded."

When the jury was directed to return a verdict of not guilty for Caputo, Treficanto's counsel moved to strike out Caputo's statement, and this was accordingly done, so that the jury did not take Caputo's statement with them.

Under these circumstances, we fail to see how the defendant Treficanto was harmed by Caputo's statement.

It is submitted, therefore, that the refusal of a severance caused no injury to defendant Treficanto.

The motion for severance preceded the trial; it was argued in the Judge's chamber; therefore it is not a manifest wrong or injury suffered on the trial below within the purview of section 136 of the Criminal Procedure Act.

State v. Tongbanni, 96 N. J. L. 63.

The law is well settled in this State that the refusal of a severance is a matter of discretion not reviewable on error.

State v. Tongbanni, 96 N. J. L. 63.

State v. Bassone, 88 N. J. L. 45.

State v. Nixon, 86 N. J. L. 371.

It is submitted, therefore, that there was no error in refusing the severance.

It is respectfully submitted, therefore, that the judgment of the trial court should be affirmed.

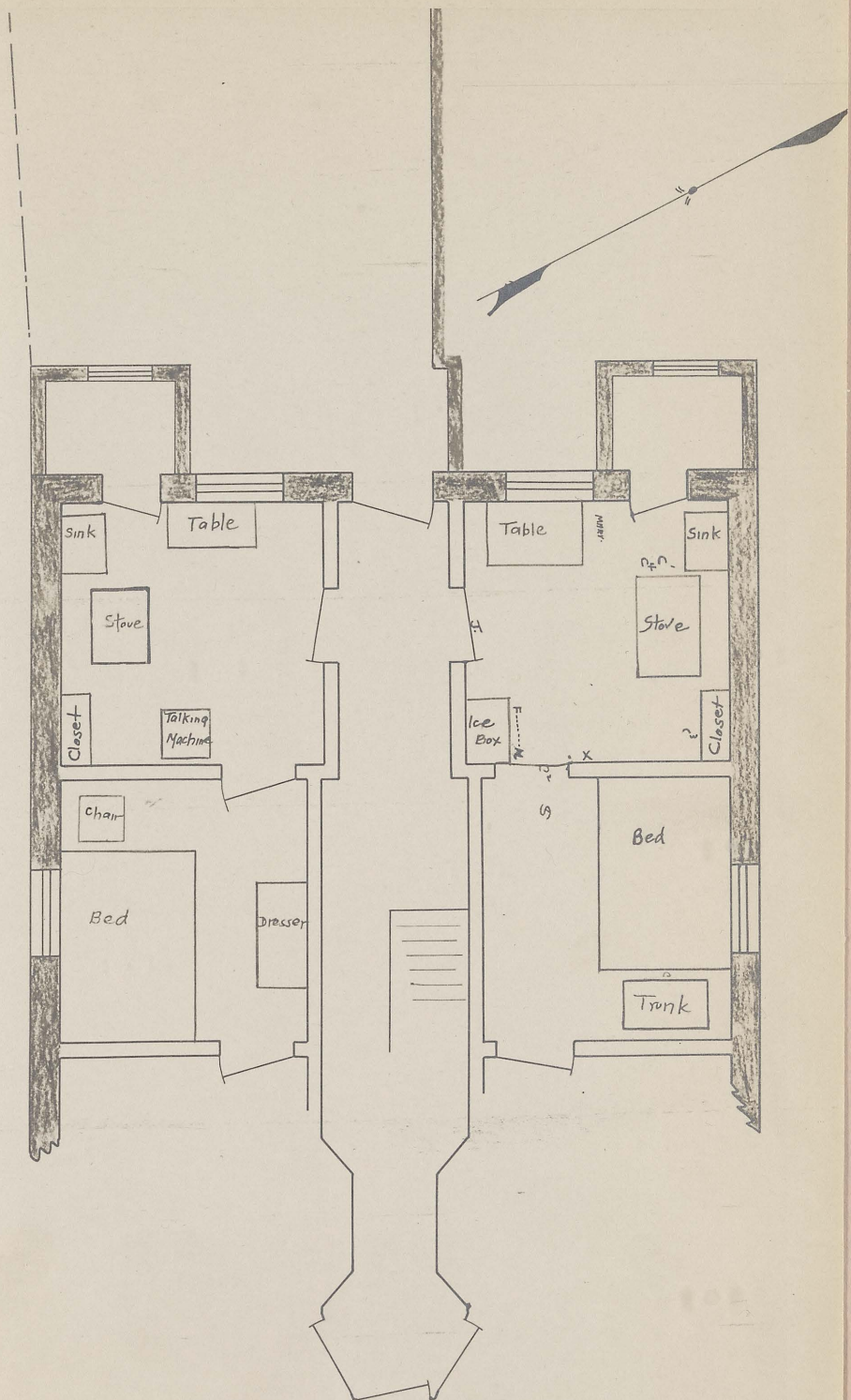
Respectfully submitted,

JOSEPH L. SMITH,
Prosecutor of the Pleas.

FRANK B. BOZZA,
Assistant Prosecutor of the Pleas.

W.A.
H.K.

25 story
Rear of +
New



2nd
Floor

2 Story Brick.
Rear of + 72 Hayes St.
Newark N.J.

Scale 1/2 Inch = 1 foot.

John J. Bracken - Surveyor
776 Broad St, Newark, N.

March 14, 1928

